

**II. COMMITTEE ACTIONS AND FILINGS OF
THE PARTIES PRIOR TO THE AUGUST 4,
2010 HEARING ON PRE-TRIAL MOTIONS**

d. Pre-Trial Motions

- iii. Cross Motions regarding the Admission of
Prior Testimony, Transcripts and Records from
Prior Judicial and Congressional Proceedings**

**In The Senate of The United States
Sitting as a Court of Impeachment**

)
In re:)
Impeachment of G. Thomas Porteous, Jr.,)
United States District Judge for the)
Eastern District of Louisiana)
)

**JUDGE G. THOMAS PORTEOUS, JR.’S MOTION TO EXCLUDE
PRIOR TESTIMONY AND LIMIT THE PRESENTATION OF
TESTIMONIAL EVIDENCE TO LIVE WITNESSES**

NOW BEFORE THE SENATE, comes Respondent, the Honorable G. Thomas Porteous, Jr., a Judge of the United States District Court for the Eastern District of Louisiana, and respectfully requests that the Senate enter an order excluding all prior testimony (except for use solely to impeach the credibility of a testifying witness) and limiting the presentation of testimonial evidence during the evidentiary hearing to that provided by live witnesses. In support, Judge Porteous states as follows.

Introduction and Summary

As Judge Porteous has noted in other motions filed today, this case comes to the Senate without the benefit of a prior trial and adjudicated record – a common denominator among all other modern judicial impeachments. This case is further marred by the fact that the process leading to impeachment was rife with procedural and substantive denials of Judge Porteous’s right to challenge witnesses and present a meaningful defense. Rather than fully filtering and testing allegations and witnesses through the adversarial process, Judge Porteous was repeatedly denied full and fair opportunities to meaningfully cross-examine the witnesses called to testify against him.

The right to confront and cross-examine one's accusers is fundamental to the American legal system. Indeed, highlighting "the value of cross-examination in exposing falsehood and bringing out the truth," the U.S. Supreme Court has stated that "[t]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their ... belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 404-05 (1965). To satisfy this constitutional goal, cross-examination must be "full, substantial and meaningful in view of the realities of the situation." *United States v. Franklin*, 235 F. Supp. 338, 341 (D.D.C. 1964).

Nevertheless, the House has obtained literally reams of witness testimony elicited in prior proceedings in which Judge Porteous did not have a full and fair opportunity for cross-examination. Those prior proceedings include:

- (1) the federal grand jury convened in Louisiana;
- (2) the Fifth Circuit Special Investigatory Committee hearings;
- (3) the House Impeachment Task Force depositions; and
- (4) the House Impeachment Task Force hearings.

Judge Porteous was completely excluded from both the federal grand jury proceedings and the House Task Force depositions – and thus afforded no opportunity to confront and cross-examine any of the witnesses called to testify. Though allowed to attend the Fifth Circuit and House hearings, his ability in those proceedings to examine witnesses was significantly limited.

In any judicial court, the testimony from each of these prior proceedings would be strictly barred. To provide due process, the Senate should strive to meet the same basic requirements of fairness and avoid having its adjudicatory process tainted with such evidence. The Senate

should, therefore, exclude all prior witness testimony (with the exception of prior testimony used solely to impeach the credibility of a testifying witness) and limit the presentation of testimonial evidence to those live witnesses who appear before the Committee. Such a limitation – which is supported by prior precedent – serves the interests of justice and fairness by limiting the prejudice created by the prior proceedings’ defects, as well as enabling the Senate to judge for itself the veracity and credibility of the witnesses to be called against Judge Porteous.

Factual Background

Resolution of this Motion requires an understanding of the procedural history of this case – as well as the prejudice that Judge Porteous was subjected to along the way. That history can be summarized as follows.

For nearly nine years, the U.S. Department of Justice (the “Justice Department”), through the Public Integrity Section of its Criminal Division, conducted a criminal investigation of Judge Porteous. That investigation included extensive FBI witness interviews, grand jury subpoenas, and grand jury testimony. The Justice Department ultimately concluded its investigation by declining to pursue any criminal charges against Judge Porteous. While the “Wrinkled Robe” investigation produced a number of convictions, including of two Jefferson Parish judges, prosecutors concluded that the evidence did not support any charges against Judge Porteous. Despite this decision to not bring any charges, on May 18, 2007, the Department submitted a complaint to Edith H. Jones, Chief Judge of the United States Court of Appeals for the Fifth Circuit (“Chief Judge Jones”).

Chief Judge Jones appointed a Special Investigatory Committee (the “Special Committee”) to investigate the Justice Department’s allegations of misconduct. The Special Committee was comprised of Chief Judge Jones, Fifth Circuit Judge Fortunato Benavides, and

District Judge Sim Lake. The Special Committee retained Ronald Woods, a former United States Attorney for the Southern District of Texas, as its investigator.

On May 24, 2007, the Special Committee notified Judge Porteous of the Justice Department's complaint and the appointment of the Special Committee. On June 11, 2007, Judge Porteous's lawyer, Mr. Kyle Schonekas, sent a letter to Chief Judge Jones requesting that she recuse herself from the Special Committee given her prior involvement in denying Judge Porteous's earlier disability motion. Chief Judge Jones refused to recuse. On July 2, 2007, Mr. Schonekas informed the Special Committee that he no longer represented Judge Porteous. Eight days later, the Special Committee, in response to Judge Porteous's request for additional time to obtain new counsel, sent Judge Porteous a letter stating that "the Committee recognizes you have the right to obtain substitute counsel," but agreed to give him only approximately one additional month to prepare for the hearing. Judge Porteous thereafter retained new counsel, Mr. Michael Ellis, who requested additional time to respond to the Justice Department's complaint. The Special Committee denied this request.

Later, due to factors unrelated to Judge Porteous, the Special Committee moved its hearing to late October. On October 16, 2007, Mr. Ellis notified the Special Committee that he was withdrawing as counsel for Judge Porteous. Due to this sudden lack of representation, Judge Porteous requested a continuance of the Special Committee hearing, which was set to begin on October 29, 2007. The Special Committee denied Judge Porteous's request and ordered him to appear in this adversarial proceeding – without counsel – on October 29, 2007. During the hearing, counsel for the Special Committee called a number of witnesses to testify, including Judge Porteous. He refused to testify voluntarily and the Special Committee obtained an order granting him statutory immunity and compelling him to testify. Complying with that order,

Judge Porteous testified before the Special Committee – again without the assistance of any counsel.¹

Following its hearing, the Special Committee issued a report to the Judicial Council of the Fifth Circuit. The Judicial Council reviewed the report and forwarded it to the Judicial Conference of the United States. The Judicial Conference thereafter transmitted a certificate to the Speaker of the House of Representatives stating that consideration of impeachment of Judge Porteous may be warranted.

On September 17, 2008, the House of Representatives passed a resolution (H.R. Res. 1448, which was subsequently renewed in 2009) directing the House Judiciary Committee to inquire into whether the House should impeach Judge Porteous. The House Judiciary Committee appointed a House Impeachment Task Force, consisting of 12 Committee Members, and engaged Alan I. Baron as Special Counsel to lead the House’s inquiry. The House Impeachment Task Force requested and received numerous records from the Justice Department and the Fifth Circuit, including grand jury testimony and documents, the Special Committee Report, and the transcript of Judge Porteous’s immunized testimony before the Special Committee. As part of their investigation, the House Impeachment Task Force staff also “interviewed over 70 individuals and took over 25 depositions.” (*See* H.R. Rpt. No. 111-427, at 7 (2010), Report of the House Judiciary Committee concerning the Impeachment of Judge Porteous (the “House Report”).) Judge Porteous was not afforded an opportunity to attend or participate in any of these interviews or depositions.²

¹ The impropriety of the House’s attempt to use Judge Porteous’s prior immunized testimony in this proceeding is the subject of a separate motion filed concurrently herewith.

² Indeed, Judge Porteous has not even received the names of everyone that the House Impeachment Task Force staff interviewed and/or deposed.

On November 6, 2009, the House Impeachment Task Force sent a letter to Judge Porteous's counsel advising of its intent to hold a set of hearings concerning the allegations against Judge Porteous. (See Letter from A. Schiff and B. Goodlatte to R. Westling dated November 6, 2009.) In that letter, the Task Force noted that these hearings "do not constitute a trial" and "the procedural rules that would govern a federal trial ... are entirely inapplicable to our hearings." (*Id.* at 2.) The Task Force further stated that, while Judge Porteous would be allowed to examine the witnesses that it decided to call, he would be allowed only "ten minutes of examination." (*Id.*)

In November and December 2009, the House Impeachment Task Force held a series of four hearings regarding Judge Porteous's alleged misconduct. Across all four hearings, only seven factual witnesses (as well as a bankruptcy judge and three law professors)³ were called to testify. Judge Porteous was given only a limited right to participate in these hearings. Indeed, during opening statements at the first hearing, Representative Adam Schiff, Chairman of the House Impeachment Task Force, stated that "counsel for Judge Porteous will be permitted to question any of the witnesses [called by the House to testify] that he so chooses for 10 minutes each." (Task Force Hearing Transcript, Ser. No. 111-43, at 5 (Nov. 17, 2009).) Representative Schiff characterized this limited grant of time as an "extraordinary prerogative," given the House's belief that its impeachment inquiry "is not a trial, but is more in the nature of a grand jury proceeding." (*Id.*) Finally, Representative Schiff admonished "Judge Porteous and his

³ The House Impeachment Task Force called to testify only experts who agreed with the basis for the proposed articles of impeachment. No expert witnesses were called who disagreed with the use of pre-federal conduct or the use of subjective questions of "embarrassment" as the basis for impeachment. Given the issues laid out in Judge Porteous's Motions to dismiss each of the four Articles (also filed concurrently herewith), it is astonishing that the House did not invite a single expert to advance these arguments for a balanced record before the vote of the House of Representatives.

counsel that no objections or other interruptions in the testimony will be permitted.” (*Id.*) These hearing were conducted without regard to the rules of evidence, or of civil or criminal procedure.

Following these hearings, the House voted on, and approved, four articles of impeachment against Judge Porteous. (*See* H.R. Res. 1301.) The House appointed five of its members to serve as House Managers, who presented the articles to the Senate and are now serving as prosecutors in the Senate impeachment trial.

In connection with the trial, the House Managers have preliminarily designated either eighteen or nineteen witnesses to testify before the Senate. (*See* House Preliminary Witness Designation, filed June 8, 2010, and House Supplemental Filing thereto, filed June 30, 2010.) The House Managers have also indicated that they intend to introduce significant portions of the prior testimony elicited from these (and other) individuals.

Argument

The right of an accused to confront and cross-examine witnesses called against him is a core constitutional right. Indeed, the Sixth Amendment to the Constitution specifically guarantees that, “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him....” U.S. CONST. amend. VI. While the parties may debate whether impeachment proceedings constitute “criminal prosecutions,” the House has always crafted impeachment cases with reference to the criminal code and the Senate has always strived to afford the basic rights found in federal courts. For an accused judge, an impeachment proceeding is a prosecution by a professional staff who seek to strip him of a constitutional office guaranteed by Article III of the Constitution to him for life. In such circumstances, the

constitutional rights of confrontation and cross-examination must attach, and must be observed.⁴ Moreover, the adversarial process is critical in effectively testing evidence and allegations, and in producing a reliable record for the adjudication of claims.

Construing these rights, the Supreme Court has held that the “main and essential purpose of confrontation is to secure ... the opportunity of cross-examination.” *Davis v. Alaska*, 415 U.S. 308, 315 (1974) (citations omitted). Cross-examination is critically important to the search for truth, as “[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.” *Id.* at 316. Indeed, cross-examination is necessary to test witnesses’ perceptions and memory, reveal biases, prejudices, and motives, and, discredit and/or inquire into witnesses’ character for truthfulness. *Id.* None of this is likely to occur if the only party to examine a witness is the party who elected to call that witness to testify. Thus, the Sixth Amendment limits the admissibility of prior testimonial statements to only those where (1) the witness is unavailable at the time of the later proceeding and (2) the individual against whom that testimony will be used had a full and fair opportunity to cross-examine the witness under oath when the earlier testimony was elicited. *Crawford v. Washington*, 541 U.S. 36, 51-52, 59 (2004) (extending the Confrontation Clause to include out-of-court testimonial statements, such as prior testimony at a preliminary hearing, before a grand jury, and at an earlier trial, as well as during police interrogations). Absent both of these criteria, prior testimony must be excluded.

The House Managers have indicated that they intend to attempt to introduce into evidence in the Senate impeachment trial wide swathes of testimony obtained in prior

⁴ Indeed, in *Crawford v. Washington*, 541 U.S. 36, 50 (2004), the Supreme Court explained that the “principal evil at which the Confrontation Clause [of the Constitution] was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.” Since “[t]he Sixth Amendment must be interpreted with this focus in mind,” it should certainly apply in this case, where the House has extensively used *ex parte* witness interviews and depositions to build and support its case against Judge Porteous.

proceedings. (*See, e.g.*, Letter from A. Baron to R. Westling dated March 23, 2010, attaching a list of more than 400 anticipated trial exhibits, including transcripts of grand jury testimony, Fifth Circuit testimony, and House Impeachment Task Force deposition testimony.) Indeed, in response to a question from Senate Legal Counsel, on April 13, 2010, the House Managers sent a letter to the Committee Chairman and Vice Chairman (Senators McCaskill and Hatch, respectively), stating that it “[i]s the position of the House that all the testimonial or documentary evidence that was admitted into evidence in the Fifth Circuit proceeding is admissible in the Senate trial.” The House Managers further stated that they may file a pre-trial motion seeking to “admit as substantive evidence specific prior sworn testimony at the Fifth Circuit Special Investigative Committee Hearing ... and at the House Impeachment Task Force Hearings....” (*Id.*) Importantly, and in apparent recognition of the constitutional confrontation problem that it would trigger, the House Managers also stated that, “[a]t this point in time the House does not anticipate seeking to admit testimony or witness statements that have not been subject to cross-examination.” (*Id.*)

The Senate addressed this issue during its most recent impeachment trial, that of Judge Walter Nixon. (*See generally* S. Hrg. 101-247, pt. 1 (1989).) In that proceeding, Nixon (who had previously been tried and criminally convicted of making false statements to a federal grand jury) moved to exclude all prior testimony, including from his criminal trial and from the House’s impeachment proceedings. (*Id.* at 323.) The House cross-moved to accept into evidence all prior testimony and exhibits in their entirety. (*Id.*) The then-presiding Senate Impeachment Trial Committee addressed this issue in its first pretrial order and ruled that “all testimony and exhibits in Judge Nixon’s criminal proceeding ... will be admitted, as well as all testimony and exhibits admitted in the House impeachment proceeding.” (*Id.*) Critically, the

Committee expressly premised this ruling on its conclusion that “[t]he prior testimony has been the subject of adverse cross-examination, and its use will not prejudice any party.”⁵ (*Id.*) As explained in greater detail below, these two safeguards – which formed the foundation for the Committee’s ruling in the Nixon impeachment – simply are not present in this case.

None of the prior testimony relevant to this case (whether before the grand jury, the Fifth Circuit, or the House Impeachment Task Force) was subject to sufficiently full and fair cross-examination to permit its introduction as substantive evidence in this proceeding. Thus, the Senate should exclude all prior testimony from each of the following four proceedings.

1. **Grand Jury Testimony**

As with all such proceedings, the grand jury tasked with investigating the allegations of Judge Porteous’s criminal misconduct operated in secret. Though that grand jury was quite active, and heard the testimony of numerous witnesses, Judge Porteous had no opportunity to participate in that proceeding. He was not present for the examination of any witnesses and he had no opportunity to either confront or cross-examine the individuals called to testify. Accordingly, the Senate should refuse to admit into substantive evidence in this case all witness testimony given in front of the grand jury investigating Judge Porteous. This would specifically

⁵ This ruling accords with an earlier decision of the Senate Impeachment Trial Committee in connection with the impeachment trial of Judge Alcee Hastings, which stated that:

[T]he Committee does not believe it appropriate to admit prior testimony into evidence on key points where credibility, context or interpretation are in dispute – particularly where the opposing party has not had an opportunity for cross-examination.

(S. Hrg. 101-194, pt. 2A, at 61-62 (1989); emphasis added.)

include the more than 10 transcripts of grand jury testimony⁶ that the House included on its exhibit list. Such evidence is routinely barred in federal and state courts. *See* Fed. R. Evid. 801(c), 802, and 804(b)(1); 5 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 8:120 (3d ed. 2010) (noting that the government cannot invoke the former testimony hearsay exception “to offer prior grand jury testimony against defendants, because defendants have no right to attend grand jury proceedings or question witnesses”); *United States v. Darwich*, 337 F.3d 645, 658 (6th Cir. 2003) (excluding grand jury testimony because the defendant had no opportunity to examine the witness).

Excluding this testimony will not prejudice the House. Indeed, the House has had access to the testimony for quite some time, and has used it to build its case against Judge Porteous. The only consequence of excluding the prior grand jury testimony is that the House will be required to present its case, through live witnesses, to the Senate. Those witnesses will then be subject to true adversarial questioning, a standard requirement for admissibility under the federal rules.

2. Fifth Circuit Testimony

As discussed above, Judge Porteous was forced to proceed without counsel before the Fifth Circuit. This severely prejudiced his ability to present his case and irreparably impaired his opportunity to conduct full and fair cross-examination of the witnesses called to testify against him. Absent a meaningful opportunity for cross-examination, the testimony before the Fifth Circuit lacks key indicia of reliability and trustworthiness, and so should be excluded from this proceeding.

⁶ Such testimony includes that of Robert Creely, Jacob Amato, Leonard Levenson, Don Gardner, Warren Forstall, Rhonda Danos, Joseph Mole, Ronald Bodenheimer, and Claude Lightfoot, all of whom (with the exception of Forstall) have been preliminarily designated as witnesses to be called by the House.

The House Managers have previously argued that, because Judge Porteous was able to call witnesses on his own behalf and cross-examine the government's witnesses before the Fifth Circuit, he suffered no prejudice as a result of representing himself. Judge Porteous, however, was specifically denied the ability to examine the Justice Department lawyers (Messrs. Ainsworth and Petalas) who oversaw the government's investigation of him, as those lawyers, as well as Chief Judge Jones, were intermittently labeled as the "complainants" – thereby cutting off Judge Porteous's ability to challenge the method or veracity of these key witnesses. (*See* Fifth Circuit hearing transcript at 16-19.) Moreover, the House's bare assertion that Judge Porteous was not prejudiced is not sufficient to address this constitutional defect. Indeed, according to the Supreme Court, denying an accused his right to effective cross-examination is "constitutional error of the first magnitude and no amount of showing of want of prejudice" can cure it. *Davis*, 415 U.S. at 318 (quoting *Brookhart v. Janis*, 384 U.S. 1, 3 (1966)). The opportunity for cross-examination that Judge Porteous was afforded in the Fifth Circuit was merely an "empty formality," and a far cry from a "full, substantial and meaningful [cross examination] in view of the realities of [his] situation." *See Franklin*, 235 F. Supp. at 341.

Here again, excluding the testimony previously elicited before the Fifth Circuit will not prejudice the House. In fact, of the nine individuals who testified before the Fifth Circuit and for whom the House has included Fifth Circuit transcripts on its exhibit list, eight are currently listed on the House's preliminary witness list. If the House truly believes that these individuals' testimony before the Fifth Circuit is relevant to the Senate impeachment trial, then it should call them to testify, inquire as to the relevant points, and permit them to be fully cross-examined.

3. House Impeachment Task Force Deposition Testimony

During its investigation, which proceeded in the nature of a grand jury investigation, the House Impeachment Task Force “interviewed over 70 individuals and took over 25 depositions.” (House Report at 7.) These interviews and depositions were scheduled unilaterally – and attended exclusively – by House Impeachment Task Force staff and counsel. Neither Judge Porteous nor his counsel were permitted to attend any of these interviews or depositions. Accordingly, none of the resulting testimonial statements was subjected to any cross-examination. This materially reduced the quality of the testimony, which was clearly affected by the House Impeachment Task Force staff’s efforts to steer witnesses away from testimony that conflicted with their assertions of unlawful conduct and often consisted of asking witnesses simply to acknowledge factual assertions needed to prop up the impeachment allegations. If opposing counsel had been present, witnesses would have been allowed to finish their thoughts and explain, for example, why they rejected the notion that Judge Porteous accepted anything of value as a bribe or kickback.

Notwithstanding all of this, the House has included 28 transcripts from House Impeachment Task Force depositions on its exhibit list. All of this testimony (like the prior grand jury testimony, to which it is very much akin) should be excluded.

4. House Impeachment Task Force Hearing Testimony

Finally, the House has indicated that it may seek to introduce into evidence in the Senate the testimony that it elicited at the four House Impeachment Task Force hearings. As with the above testimony, these statements should be excluded because the witnesses were not subject to complete, substantial, and meaningful cross-examination. Indeed, the House Members and their staff and counsel were afforded significantly more time to question these witnesses than was

Judge Porteous, who was limited to only 10 minutes of cross-examination. Moreover, due to a conflict of interest with prior counsel, Judge Porteous was left without the assistance of his lead trial counsel during the testimony of the Marcottes, who are central to the allegations in Article II.⁷

Chairman Schiff was correct when he stated that the House was acting as a grand jury. (See Task Force Hearing Transcript, Ser. No. 111-43, at 5 (Nov. 17, 2009) (Rep. Schiff) (stressing that the House proceeding did not require full cross-examination because those proceedings were “not a trial, but ... [instead] more in the nature of a grand jury proceeding.”); see also Jonathan Turley, *Congress As Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735 (1999).) This is precisely why such testimony, as with grand jury testimony, should not be introduced at trial when the actual witnesses are available to be called before the Senate. The House should not seek to shelter its witnesses from appropriate cross-examination by attempting to bootstrap into this proceeding testimony that it elicited within the confines of the House, under tightly controlled opportunities for cross-examination.

⁷ Former lead counsel Richard Westling represented the Marcottes in related proceedings in Louisiana and continues to represent the Marcottes today. When the conflict was raised before the House, Mr. Westling wrote to Louis and Lori Marcotte explaining the possible conflict issues and seeking a waiver of any possible conflict. They declined to consent to such a waiver. Mr. Westling sought to have another lawyer, Rémy Voisin Starns, appear in the House proceedings when Louis Marcotte was called as a witness. When Mr. Starns was not able to be present, Mr. Westling elected to avoid any immediate conflict by leaving the proceedings. Judge Porteous continued without his lead trial attorney during that testimony. Soon after, Professor Jonathan Turley was brought into the case as co-lead counsel, who was later joined by co-lead counsel Mr. Daniel Schwartz and the law firm of Bryan Cave LLP. Following an additional ethical review, it was confirmed that Mr. Westling had a conflict of interest and would have to withdraw from the case in full or in part. The Senate ultimately disqualified Mr. Westling from further participation in these proceedings.

Conclusion

WHEREFORE, for the all these reasons, Judge Porteous respectfully requests that the Senate issue an order excluding the use of all prior testimony (except for use solely to impeach the credibility of a testifying witness) and limiting the presentation of testimonial evidence during the evidentiary hearing to live witness testimony.

Respectfully submitted,

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Dated: July 21, 2010

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2010, I served copies of the foregoing by electronic means on the House Managers, through counsel, at the following email addresses:

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/s/ P.J. Meitl_____

In The Senate of the United States

Sitting as a Court of Impeachment

In re:)
Impeachment of G. Thomas Porteous, Jr.,)
United States District Judge for the)
Eastern District of Louisiana)

THE HOUSE OF REPRESENTATIVES' OPPOSITION TO JUDGE G. THOMAS PORTEOUS, JR.'S MOTION TO EXCLUDE PRIOR TESTIMONY AND LIMIT THE PRESENTATION OF TESTIMONIAL EVIDENCE TO LIVE WITNESSES

The House of Representatives (the "House"), through its Managers and counsel, respectfully opposes Judge G. Thomas Porteous, Jr.'s Motion to Exclude Prior Testimony and Limit the Presentation of Testimonial Evidence to Live Witnesses (the "Motion to Exclude Prior Testimony"). On July 21, 2010, the House filed a Motion to Admit Transcripts and Records from Prior Judicial and Congressional Proceedings (the "Motion to Admit"), which argues many of the points that the House would otherwise raise in opposition to the instant Motion to Exclude Prior Testimony. In an effort to avoid duplication of argument, the House therefore incorporates by reference its Motion to Admit as part of its Opposition to this Motion. In further support of its Opposition, the House respectfully submits:

OVERVIEW

Judge Porteous contends that any and all prior sworn testimony of witnesses – no matter the context in which the testimony was given and regardless of whether that testimony was subject to cross examination – should be excluded as evidence at trial before the Senate. His arguments turn nearly entirely on contentions surrounding his opportunity to cross-examine the various witnesses in the proceedings.

ARGUMENT

The House submits that the testimony which the House seeks to admit was subject to cross examination. Moreover, the Senate's need for access to all of the relevant facts should be the dominant consideration. To the extent that any Senator has concern about the reliability of such evidence, each Senator is capable of evaluating the weight to be assigned to the testimony.

The House seeks to admit the complete record evidence of the Fifth Circuit proceedings. This was a proceeding where Judge Porteous represented himself after having parted ways with two prior counsel. Judge Porteous cross-examined witnesses, presented his defense, consented to the admission of evidence, including Grand Jury Testimony of certain individuals, and introduced evidence on his own behalf. There is no valid reason to exclude the sworn testimony developed in those proceedings.

The same is also true of the proceedings in the House. The testimony was given under oath, Judge Porteous's counsel was afforded the opportunity to cross examine the witnesses and he availed himself of the opportunity. When additional time was requested by counsel, it was granted without any qualification.

The House submits that the approach taken in the Claiborne and Walter Nixon impeachments should serve as a model for the current proceedings. In connection with those Impeachments, the complete records of the prior proceedings were made part of the Impeachment records. These included, in Nixon, the records of the House proceedings.

It is important to recall that these are published records, which Senators should have available for their consideration. The proper weight to be afforded to the evidence is well within the province of the Senators. A Senate fully apprised of the relevant facts in making its ultimate judgment should be the paramount consideration.

WHEREFORE, for all of the foregoing reasons, as well as the reasons incorporated by reference from the House Motion to Admit Prior Records, the Motion to Exclude Prior Testimony filed by Judge Porteous should be denied.


Respectfully submitted,

THE UNITED STATES HOUSE OF REPRESENTATIVES

By

Adam Schiff, Manager

Bob Goodlatte, Manager


Alan I. Baron
Special Impeachment Counsel

Managers of the House of Representatives: Adam B. Schiff, Bob Goodlatte, Zoe Lofgren, Henry C. "Hank" Johnson, F. James Sensenbrenner, Jr.

July 28, 2010

In The Senate of the United States

Sitting as a Court of Impeachment

In re:

Impeachment of G. Thomas Porteous, Jr.,
 United States District Judge for the
 Eastern District of Louisiana

THE HOUSE OF REPRESENTATIVES' MOTION TO ADMIT TRANSCRIPTS AND RECORDS FROM PRIOR JUDICIAL AND CONGRESSIONAL PROCEEDINGS

Pursuant to the Senate Impeachment Trial Committee's June 21, 2010 Scheduling Order, the House of Representatives (the "House"), through its Managers and counsel, respectfully moves that the Senate Impeachment Trial Committee admit into evidence transcripts and records from (i) the Fifth Circuit Judicial Council Special Committee hearing (the "Fifth Circuit Hearing"), held on October 29-30, 2007, and (ii) the House of Representatives Impeachment Task Force hearings (the "Task Force Hearings") held on November 17-18 (Creely, Amato and Mole), December 8 (Lightfoot and Horner), and December 10, 2009 (Louis Marcotte and Lori Marcotte), which related to the possible impeachment of Judge Porteous. In both sets of proceedings, Judge Porteous, personally and through counsel, was permitted the opportunity to cross-examine witnesses, and both sets of proceedings presented the same factual issues that are the bases for the Articles of Impeachment. Admission of these materials – including materials that are in the public record – will provide the Senate a complete record of all sworn testimony, and will permit the focusing of issues at trial. In support of this motion, the House respectfully submits:

I. THE FIFTH CIRCUIT SPECIAL COMMITTEE HEARING AND
THE PROCEEDINGS BEFORE THE HOUSE IMPEACHMENT TASK FORCE

A. FIFTH CIRCUIT HEARING OF OCTOBER 29-30, 2007

On October 29-30, 2007, the Fifth Circuit Special Investigative Committee held a disciplinary hearing pursuant to a complaint and notice to Judge Porteous. The complaint set forth allegations that substantially overlap the allegations in Impeachment Articles I and III involving, respectively, (i) Judge Porteous's relationship with attorneys Creely and Amato and his handling of the Liljeberg case, and (ii) his handling of his 2001 bankruptcy. Judge Porteous attended that hearing, heard the witnesses, had the same motive to cross-examine them and elucidate facts as he has in the present proceeding, in fact cross-examined the witnesses, and called his own witnesses.¹ In addition, Judge Porteous agreed to the admission of numerous documentary exhibits – including evidence that has been marked as exhibits by the House for the Impeachment trial – and agreed to stipulate to the admission of grand jury testimony of certain individuals who were not called as witnesses. For example, Judge Porteous participated in the following colloquy concerning the admissibility of certain witness transcripts:

Judge Porteous: I intended to call - well, first, do you want to get into the stipulations?

Mr. Woods: Sure.

Judge Porteous has agreed to stipulate to the grand jury testimony of Leonard Levenson and Chip Forstall rather than we calling them as

¹On October 29, 2007, the following witnesses testified: FBI S/A Dewayne Horner, Judge Porteous, Joseph Mole, Robert Creely, and Jacob Amato, Jr. On October 30, 2007, the following witnesses testified: Edward Butler, S/A Horner (recalled), FBI Financial Analyst Gerald Fink, former Bankruptcy Judge William Greendyke, Bankruptcy Trustee William Heitkamp, and Rhonda Danos. Judge Porteous then called Claude Lightfoot and Donald Gardner as his own witnesses.

witnesses. And I believe he's agreed also to stipulate to the 302, or the FBI memorandum of interview, of SJ Beaulieu.

Judge Porteous: With attached correspondence.

Mr. Woods: And with attached correspondence. Rather than us calling Beaulieu, the trustee.²

Similarly, the following discussion occurred relative to the admission of exhibits 1 through 96:

Mr. Woods: ... And just for purposes of the record, we would like everything on the exhibit list to be offered and admitted into evidence.

And Judge Porteous has some objections he wants to raise as to the grand jury testimony.

Chief Judge Jones: All right.

Judge Lake: So, 1 through 96, you're offering?

Mr. Woods: Yes, your Honor.

Judge Porteous: Only two objections in general. One is to the admissibility of those grand jury transcripts. People have come in and testified. Now, the ones that are stipulated to, obviously they'll go in, Mr. Levenson -

Mr. Woods: Forstall.

Judge Porteous: - Forstall, and Mr. Beaulieu, which is a 302. But the others, I would object to.³

After a further colloquy that established that Judge Porteous had been provided the grand jury testimony that was included on the exhibit list in advance of the Hearing (including the testimony of Mr. Creely, Mr. Amato and Ms. Danos), Judge Jones admitted that

²Fifth Cir. Hearing at 341.

³Id. at 426-27.

grand jury testimony, though she indicated, in substance, that the Special Committee would not be relying on it.⁴ With that understanding, all the exhibits were admitted.

B. THE HOUSE IMPEACHMENT TASK FORCE HEARINGS
OF NOVEMBER AND DECEMBER 2009

The House Committee on the Judiciary Impeachment Task Force, chaired by House Manager Schiff, held four hearings in November and December of 2009. At the first hearing, on November 17-18, Mr. Amato, Mr. Creely and Mr. Mole testified and were subject to cross-examination by Judge Porteous's counsel. In advance of that hearing, copies of Mr. Creely's and Mr. Amato's Task Force deposition testimony were provided to counsel.⁵ On December 8, Judge Porteous's bankruptcy attorney, Mr. Lightfoot, testified (along with other witnesses, including FBI Special Agent Horner), and the Task Force provided counsel Mr. Lightfoot's deposition. Judge Porteous had previously called Mr. Lightfoot as his own witness before the Fifth Circuit, and Judge Porteous's attorney was present for that hearing and had the opportunity to cross-examine Mr. Lightfoot, but declined to ask questions. Finally, on December 10, 2010, Louis Marcotte and Lori Marcotte testified. Judge Porteous was present, and his attorney was notified in advance of that hearing that he would be given the opportunity to examine the witnesses, but no attorney for Judge Porteous appeared at that hearing. As Mr. Schiff stated on the record at the outset of that hearing: "Judge Porteous's counsel was again afforded the opportunity to question the witnesses but has opted not to question the

⁴Id. at 430. A copy of the Fifth Circuit Special Committee exhibit list is attached as "Attachment 1."

⁵Mr. Mole had not been deposed.

witnesses today. Judge Porteous is present with us this morning.”⁶ Throughout the Hearings, though the House operated on a “five minute rule” for Members, Mr. Westling was initially provided ten minutes to cross-examine the witnesses, and whenever he sought additional time (which he did on two occasions), such time was granted to him by Task Force Chairman Schiff without any time limitation.⁷

The House seeks the introduction of the transcripts and evidence from these two proceedings, so that the Senate will have a complete record of the witnesses’ testimony, especially where some of the trial testimony will occur nearly 3 years after the Fifth Circuit testimony, and, in some instances, where that testimony relates to conduct that occurred in the early 1990s. As noted, Judge Porteous has had a chance to cross-examine all the witnesses, and indeed personally cross-examined some of them (as did his counsel in the House Impeachment Task Force Hearings). Further, there are circumstantial guarantees of trustworthiness of much of the testimony – Judge Porteous has admitted much, if not nearly all, the conduct at issue, but has simply taken issue with proof of intent or the significance of his conduct on the issue of whether he should be impeached.⁸

⁶To Consider Possible Impeachment of United States District Judge G. Thomas Porteous, Jr., (Part III), Hearing Before the Task Force on Judicial Impeachment of the Committee on the Judiciary, Ser. No. 111-45, Dec. 10, 2009, 111th Cong., 1st Sess., 3.

⁷See To Consider Possible Impeachment of United States District Judge G. Thomas Porteous, Jr., (Part I), Hearing Before the Task Force on Judicial Impeachment of the Committee on the Judiciary, Ser. No. 111-43, Nov. 18, 2009, 111th Cong., 1st Sess., 189 (Mr. Westling: “Mr. Chairman, I am noticing my light is on. Could I have a few more moments?” Mr. Schiff: “Yes, of course, Counsel.”); To Consider Possible Impeachment of United States District Judge G. Thomas Porteous, Jr., (Part IV), Hearing Before the Task Force on Judicial Impeachment of the Committee on the Judiciary, Ser. No. 111-46, Dec. 15, 2009, 111th Cong., 1st Sess., 51 (Mr. Westling: “Mr. Chairman, I note my light is on. May I proceed.” Mr. Schiff: “Of course.”).

⁸Judge Porteous’s own testimony at the Fifth Circuit Hearing provides additional assurance as to the reliability of the witness testimony at issue in this Motion. As noted

The House recognizes some of the testimony may, at the end of the day, be duplicative of some of the live testimony. It is not possible to identify such testimony line by line at this time, nor is it necessary to do so. If the witness testifies consistently with prior testimony, that fact may itself be relevant to the evaluation of the witness's credibility, and by admitting the prior testimony the Senate will have a complete record of what these witnesses have stated under oath at all prior proceedings. Decisions as to the weight of the evidence are ultimately left to the individual Senators, who are certainly capable of understanding the distinction between prior and live testimony, or testimony subject to cross-examination then and now. Moreover, by having the prior evidentiary record available and admissible, the House is confident that the trial will be expedited and focused on the most critical issues.

II. RULES OF EVIDENCE IN IMPEACHMENT TRIALS

The “Procedure and Guidelines for Impeachment Trial in the United States Senate” (the “Senate Impeachment Procedures”)⁹ provide, at Rule VII, that “the Presiding Officer [of the impeachment trial] may rule on all questions of evidence including, but not limited to, questions of relevancy, materiality, and redundancy of evidence and incidental questions.” Under Rule XI (which provides for the establishment of a Committee to hear the evidence in an impeachment case), the Chairman of the Rule XI Committee shall “exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and

in the companion motion filed in this Impeachment proceeding, Judge Porteous made numerous statements in which he confirmed the substance of the testimony of various of the witnesses at that hearing. See House of Representatives’ Notice of Intent to Introduce at Trial Judge Porteous’s Testimony Before the Fifth Circuit Special Committee.

⁹Senate Doc. 99-3, 99th Cong., 2d Sess. (1986).

practice in the Senate when sitting on impeachment trials.” The Senate Impeachment Procedures do not limit the Presiding Officer to any set of evidentiary rules, and, as a practical matter, provide the Presiding Officer substantial discretion in the admission of evidence.

Moreover, it is well established that the Federal Rules of Evidence or other strict rules of evidence have no place in impeachment proceedings. In 1989, the Senate Committee on Rules and Administration issued a Report that addressed various impeachment issues arising in the Hastings Impeachment proceedings, including a section that explained why the Federal Rules of Evidence did not pertain to impeachment trials.¹⁰ In rejecting adoption of the Federal Rules of Evidence, the Report stressed that “[a] Senate vote is the ultimate authority for determining the admissibility of evidence” and cited a legal scholar for the proposition that if the Rules of Evidence were adopted “[i]t is not hard to imagine a trial governed by a detailed body of rules becoming bogged down in technical disputes, with the ascertainment of facts the victim.”¹¹ The Report cited Yale Professor Charles Black in support of the proposition that “technical rules of evidence designed for juries have no place in the impeachment process”¹² and concluded:

¹⁰Procedure for the Impeachment Trial of U.S. District Judge Alcee I. Hastings in the United States Senate, Report of the Senate Committee on Rules and Administration to Accompany S. Res. 38 and S. Res. 39, Rpt. 101-1, 101st Cong., 1st Sess. (1989) at 111-12. That portion of the Report is attached as “Attachment 2.”

¹¹Id. (quoting S. Burbank, “Alternative Career Resolution: An Essay on the Removal of Federal Judges,” 63 Ky. L.J. 643, 692 (1988)).

¹²The Report quoted the following from Professor Black’s treatise on Impeachment:

Both the House and the Senate ought to hear and consider all evidence which seems relevant, without regard to technical rules. Senators are in any case continually exposed to “hearsay” evidence; they cannot be sequestered and kept away from newspapers like a jury. If they cannot be

“The Senate must retain its freedom to review evidence issues as they present themselves. The Senate should not restrict itself unnecessarily by making its decisions in a vacuum, before the trial has even begun.”¹³

These evidentiary principles were reiterated by the Hastings Trial Committee, which likewise explicitly rejected formal rules of evidence. In disposing of various legal motions, that Committee stated:

Sixth, the parties have expressed an interest in the evidentiary principles that will govern these proceedings. The committee’s task is to receive and report evidence to the Senate. The Senate reserves the power to determine the competency, relevancy, and materiality of the evidence received by the committee. The committee is not bound by the Federal Rules of Evidence, although those rules may provide some guidance to the committee. Members of the Senate sit both as judges of law and fact. Precise rules of evidence are not needed in an impeachment trial to protect jurors, lay triers of fact, from doubtful evidence. In the end, the task of members of the Senate will be to weigh the relevance and quality of the evidence.¹⁴

In short, the Senate Impeachment Trial Committee has discretion to admit the records of prior proceedings related to Judge Porteous, and, “[i]n the end, the task of members of the Senate will be to weigh the relevance and quality of the evidence.”¹⁵

trusted to weigh evidence, appropriately discounting for all the factors of unreliability that have led to our keeping some evidence away from juries, then they are not in any way up to the job, and “rules of evidence” will not help.

Id. (citing Black, C., Impeachment: A Handbook (1974) at 18 (emphasis in original)).

¹³Id.

¹⁴Disposition of Pretrial Issues, April 14, 1989, p. 13, published in Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, S. Hrg. 101-194, Pt. 1 at 293 (1989) [hereinafter Judge Hastings Senate Impeachment Report Pt. 1]. That “Disposition” is attached as “Attachment 3.”

¹⁵Id.

III. IMPEACHMENT PRECEDENT ESTABLISHES THAT RECORD EVIDENCE FROM PRIOR PROCEEDINGS IS ADMISSIBLE IN IMPEACHMENT TRIALS

In the Claiborne, Nixon, and Hastings Impeachment proceedings, the respective Senate Trial Committees accepted record evidence from prior evidentiary proceedings into evidence.

The Judge Claiborne Impeachment Proceedings. In the Claiborne Impeachment proceeding, the House sought by motion to introduce select transcripts from Judge Claiborne's second trial.¹⁶ In granting the House's motion, Trial Committee Chairman Mathias stated that "Judge Claiborne may offer an objection to any particular item of evidence from his second trial if there is a basis for objection other than the fact that prior testimony or exhibits are being used to establish the truth of the matters asserted."¹⁷ In other words, Judge Claiborne was permitted to raise objections to the transcripts other than the fact that the transcripts were hearsay, *i.e.*, that they were to be used for "the truth of the matters asserted." Chairman Mathias went on to note the significance of the fact that the testimony at issue had been subject to cross-examination: "We will only be using for our own fact-finding purposes sworn testimony taken in the presence of Judge Claiborne and subject to his counsel's examination or cross-examination."¹⁸

¹⁶See [The House of Representatives'] Motion to Accept as Substantive Evidence Certain Testimony and Documents, In re: Impeachment of Judge Harry E. Claiborne, reprinted in Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate, S. Hrg. 99-812, 99th Cong., 2d Sess. (1986) at 297 [hereinafter Judge Claiborne Senate Impeachment Report].

¹⁷Proceedings of the Claiborne Impeachment Trial Committee, Sept. 10, 1986 (statement of Sen. Mathias), printed in Judge Claiborne Senate Impeachment Report at 110.

¹⁸*Id.* Although Chairman Mathias further noted that the facts contained in the testimony appear not to have been the "subject of controversy," *id.* at 110-11, that observation was clearly secondary to the Committee's focus on procedural fairness and the fact that the prior testimony was subject to the opportunity for cross-examination.

The Judge Nixon Impeachment Proceedings. Similarly, in the Judge Nixon Impeachment proceeding, the House requested that the Nixon Senate Committee receive into evidence the complete trial record, representing that “key witnesses” would be called in any event.¹⁹ As the House explained in its motion:

With this evidence before it, the Senate Committee will be able to examine, as necessary, the complete prior testimony of key witnesses whose credibility may be at issue; the testimony of minor witnesses whose credibility is not in issue and who need not be summoned to testify in person; and all exhibits heretofore admitted into evidence, however minor. With the permission of the Committee, the House and Respondent will then be able to reserve valuable trial time for the most important evidence, and may refer to the prior record to supplement their presentation at trial and during post-trial briefing.²⁰

At oral argument on this motion, House Manager Edwards stated, first, that records of the prior criminal proceedings are “public records” which “should be available to each Senator” in order to “ensure that all relevant facts are before the Senate;” second, the admission of the prior testimony “will also help to streamline the trial;” and finally, Judge Nixon would not be prejudiced for two reasons: “First, he is free to subpoena any witness he chooses for live testimony; and second, much of the trial and subcommittee record consists of Judge Nixon’s cross-examination of witnesses. How can it be

¹⁹The House of Representatives’ Motion to Accept Prior Testimony and Exhibits, In re: Impeachment of Judge Walter L. Nixon, Jr., at 1, reprinted in Report of the Senate Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr., Hearings before the Senate Impeachment Trial Committee, United States Senate, S. Hrg. 101-247, 101st Cong., 1st Sess. (1989) at 199 [hereinafter Judge Nixon Senate Impeachment Report].

²⁰Id. (House Motion) at 2-3; Judge Nixon Senate Impeachment Report at 200-01.

prejudicial to admit into evidence the prior testimony of witnesses when the judge has fully exercised his right of cross-examination?”²¹

The Nixon Senate Committee accepted the House’s argument and ruled in favor of admission of both the prior Nixon criminal trial record (testimony and exhibits) as well as the House Impeachment Hearing record:

The House has moved to accept into evidence the record of all prior testimony and exhibits in its entirety. The Committee believes that introduction of the record of prior testimony and exhibits will be useful to enable the Committee to focus the live testimony that it hears on the most critical witnesses. The prior testimony has been the subject of adverse cross-examination, and its use will not prejudice any party. In accordance with the House motion and in the interest of a thorough and fair proceeding, all testimony and exhibits in Judge Nixon’s criminal proceeding, including the post-trial proceeding (as requested by Judge Nixon), will be admitted, as well as all testimony and exhibits admitted in the House impeachment proceeding.²²

The Judge Hastings Impeachment Proceedings. In the Hastings Impeachment, the issues were slightly different. The House in the Hastings Impeachment sought to introduce select testimony from Judge Hastings’s criminal trial – not the full transcripts.²³

²¹Proceedings of the Judge Nixon Impeachment Trial Committee, July 13, 1989 (statement of Rep. Edwards), printed in Judge Nixon Senate Impeachment Report at 305.

²²[Judge Nixon] Impeachment Trial Committee Disposition of Pretrial Motions, First Order, July 25, 1989 at 5, reprinted in Judge Nixon Senate Impeachment Report at 319, 323.

²³Judge Hastings sought to introduce the entirety of the criminal trial for the purpose of having the Senators be aware that some of the factual allegations in the Impeachment trial were the same as those that had been tried in the criminal trial at which Judge Hastings had been acquitted, and not “for truth.” In response to a question from Chairman Bingaman as to why he sought the full transcript to be introduced, Judge Hastings’s counsel explained he wanted the entire record to be introduced “to establish the fact that the accusations made, the first 15 articles of impeachment were in fact tried to a jury more than five years ago, and were in fact fairly tried, and there is no new evidence or no material new evidence in support of that.” Proceedings of the Hastings Trial Committee, June 22, 1989, printed in Hastings Senate Impeachment Report at 836 (statement of Terence Anderson, Esq.). House Manager Bryant objected to the testimony being

By way of an Order issued July 10, 1989, the Senate Trial Committee admitted some testimony sought by the House, and denied the House's requests as to other testimony. In its Order, the Committee stated certain overarching principles:

The Committee recognizes the general objection on the grounds of hearsay made by Judge Hastings to the receipt of any prior testimony as substantive evidence..., but as noted in the Committee's disposition of pretrial issues on April 14, 1989, neither it nor the Senate is bound in these proceedings to strict judicial rules of evidence. ... On the other hand, the Committee does not believe it appropriate to admit prior testimony into evidence on key points where credibility, context or interpretation are in dispute – particularly where the opposing party has not had an opportunity for cross-examination.²⁴

Accordingly, the Committee permitted the House to introduce numerous transcripts “for truth” – those where opposing counsel had the opportunity for cross-examination and only in circumstances where the prior testimony was offered in place of a party's calling that witness in its own case.²⁵

Thus, in all three proceedings the respective Senate Committees rejected application of the Federal Rules of Evidence in deciding the issue as to the admissibility of transcripts from prior proceedings and recognized the relevance of prior sworn

introduced for this purpose, characterizing it as “in effect, a revisitation of the issue of double jeopardy, which was disposed of by a vote of 93-to-1 in the Senate, the first time the Senate took this matter up. It is an issue that has no relevance whatsoever.” *Id.* at 837. The Hastings Senate Committee denied Judge Hastings's Motion to admit the entirety of the criminal trial record. However, because of the nature of Judge Hastings's request, the decision by the Hastings Senate Committee is not pertinent to the consideration of the House's Motion in this case.

²⁴[Hastings] Impeachment Trial Committee Eighth Order, July 10, 1989 at 1-2, reprinted in Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, S. Hrg. 101-194, Pt. 2A at 61-2 (1989) [Judge Hastings Senate Impeachment Report Pt. 2A]. That Order is attached as “Attachment 4.”

²⁵The fact that Judge Porteous will have the opportunity to cross-examine some of the witnesses on their prior testimony at the depositions further supports the admissibility of the prior testimony.

testimony to the fact-finding responsibilities of the Senate. Further, in each of the three proceedings, the respective Senate Committees, in deciding to admit prior testimony (in whole or in part) took into consideration that the opposing party had the opportunity to cross-examine the witness.

We recognize that the Hastings Senate Committee took a narrower approach than the respective Senate Committees in Nixon and Claiborne as to the admission of the records of prior proceedings involving the respective judges. However, the decision by the Nixon Senate Committee in accepting into evidence all the relevant transcripts and exhibits – from both the criminal trial and the House proceedings – is the most recent of those three and thus implicitly rejected the narrower decision in Hastings. Further, the materials associated with Judge Hastings’s criminal trial were truly voluminous in contrast with the far smaller set of materials in the prior Claiborne and subsequent Nixon proceedings (and, an even smaller collection in the Fifth Circuit and House proceedings involving Judge Porteous). To the extent that the Senate Committee in this case refers to the prior Impeachment proceedings as guidance, we thus urge the Committee to follow the more expansive approach to accepting prior record evidence that was employed both with the Judge Claiborne and Judge Nixon Impeachments, especially insofar as that evidence is in the public record (i.e., such as the House Impeachment proceedings, some of which are available on-line), and would be available to Senators in any event.

Under these principles, therefore, the House requests that the Senate Committee rule that the Fifth Circuit Hearing testimony and exhibits relating to Judge Porteous, as well as the House Impeachment Task Force testimony and exhibits relating to Judge Porteous, all of which are in the public domain, be admissible “for truth,” and that the

weight of such evidence be left to the Senators as they consider that evidence. The admission of the Fifth Circuit Hearing testimony fits squarely within the Claiborne, Nixon and Hastings precedents. Judge Porteous either cross-examined or called witnesses at that hearing, and it would be nothing more than gamesmanship for Judge Porteous, having, for example, agreed to the admission of certain documents and transcripts at that hearing, to object to their admission before the Senate.

IV. CONCLUSION

For all the reasons discussed above, the House requests that Impeachment Trial Committee rule that the evidentiary records from the Fifth Circuit Special Committee Hearing and the Impeachment Task Force Hearings may be admitted at trial.²⁶ At present, the testimony of certain witnesses as well as certain documentary materials which were introduced in prior proceedings have been separately designated as discrete exhibits, and, at the appropriate time, the House would formally designate these materials by exhibit number and move their introduction.²⁷




²⁶Only a very small portion of the Fifth Circuit proceedings are not squarely relevant to this Impeachment proceeding. For example, the Fifth Circuit proceeding addressed whether Judge Porteous committed a fraud in a bank loan application, and one witness was called (a banker named Edward Butler) who testified on this topic. The testimony from the Fifth Circuit hearing associated with this issue has not been marked as a House Exhibit, and the House does not propose to seek its admission. With this exception, it is the House's view that all the other testimonial materials from the Fifth Circuit would be relevant.

²⁷Many of these exhibits introduced before the Fifth Circuit Special Committee Exhibit List are also marked as potential trial exhibits on the House's exhibit list. In many instances, the House has selected a few pages from a broader document collection, such as specific casino records, so as to narrow the volume of records that will be admitted. The House proposes to introduce only the pages from document collections that are relevant. Indeed, most of these Fifth Circuit exhibits are business records and would be admissible regardless of their status as Fifth Circuit exhibits.

WHEREFORE, the House requests that the complete evidentiary records of the Fifth Circuit Proceeding and the Task Force Impeachment Hearings be admissible; that, in advance of the trial, the Senate Committee designate a date certain for both parties to designate transcripts and exhibits for admission; and that either party may object to the other party's designation on grounds other than the fact that the materials are being offered "for truth."

Respectfully submitted,

THE UNITED STATES HOUSE OF REPRESENTATIVES

 By 
 Adam Schiff, Manager Bob Goodlatte, Manager

 Alan I. Baron
 Special Impeachment Counsel

Managers of the House of Representatives: Adam B. Schiff, Bob Goodlatte, Zoe Lofgren, Henry C. "Hank" Johnson, F. James Sensenbrenner, Jr.

July 21, 2010

Attachment One

EXHIBIT LIST

Exh. #	Description	Date	Mark	Offer	Obj.	Admit	Witness	Bates Range
1	Porteous Bankruptcy File							SC00001-00199
2	Glen O. Gabbard, M.D. Report	10/10/07						SC00200-00211
3	Porteous Financial Disclosure Reports							SC00212-00271
4	Regions Bank Loans							SC00272-00295
5	Lightfoot Letter Re: Regions Bank	12/21/00						SC00296-00299
6	Danos Grand Jury Exhibits Hibernia Bank Accounts							SC00300-00307
7	Danos Grand Jury Exhibits Check Register							SC00308-00338
8	Danos Grand Jury Exhibits Danos Notes							SC00339-00377
9	Forstall Grand Jury Exhibits							SC00378-00387
10	Gardner Grand Jury Exhibits	03/31/06						SC00388-00398
11	Beaulieu 302 Pamphlet Letters							SC00399-00420
12	Lightfoot Crime Fraud Orders							SC00421-00427
13	Amato Exh AMEX	4/99- 9/99						SC00428-00442

Exh. #	Description	Date	Mark	Offer	Obj.	Admit	Witness	Bates Range
14	Amato Exh AMEX	9/99-12/99						SC004443-00449
15	Amato Exh AMEX	12/99-11/00						SC00450-00479
16	Amato Exh AMEX	12/01-05/02						SC00480-00484
17	Amato Grand Jury Exhibit - Calendar							SC00485-00535
18	Code of Conduct for U.S. Judges							SC00536-00551
19	Motion to Recuse in <i>Liljeberg</i> Case							SC00552-00584
20	Harran's Credit Application	04/30/01						SC00585-00588
21	Fleet Credit Card Records	3/01-08/01						SC00589-00594
22	341 Hearing Transcript	05/09/01						SC00595-00598
23	PO Box Application	03/20/01						SC00599
24	2000 Tax Return Refund							SC00600-00601
25	Porteous Bank Account Re. Refund Receipt							SC00602
26	Porteous W-2's	2000 2001						SC00603-00605
27	Concealed Bank Balance							SC00606-00610
28	Concealed Bank Acct at Fidelity							SC00611-00617
29	Preferred Payment-Fleet Credit Card							SC00618-00620

Exh. #	Description	Date	Mark	Offer	Obj.	Admit	Witness	Bates Range
30	Gambling Losses	03/28/00 - 03/28/01						SC00621-00641
31	Lightfoot File (Pages 1-32)							SC00642-00673
32	Ch 13 Trustee Beauieu File on Porteous Bankruptcy							SC00674-00757
33	Grand Jury Subpoena Log							SC00758-00766
34	DOJ Complaint	05/18/07						SC00767-00788
35	New Judicial Misconduct Complaint	08/28/07 Eff						SC00789-00791
36	Crime Fraud Order	05/21/07						SC00795-00798
37	Immunity Order-Debra Mull	10/19/04						SC00799-00803
38	Immunity Order-Jacob Amato, Jr.							SC00804-00808
39	Immunity Order-Robert Creely							SC00809-00813
40	Immunity Order-Rhonda Danos							SC00814-00818
41	Immunity Order-Warren Forstall, Jr.							SC00819-00823
42	Immunity Order-Donald Gardner							SC00824-00828
43	Immunity Order-Leonard Levenson							SC00829-00833
44	Immunity Order Claude Lightfoot, Jr.							SC00834-838

Exh. #	Description	Date	Mark	Offer	Obj.	Admit	Witness	Bates Range
45	Immunity Order Joseph Mole							SC00839-00843
46	Porteous Immunity Order							SC00844-00848
47	Porteous Correspondence							SC00849-00955
48	Caesars Palace Records							SC00956-01085
49	Grand Gulfport Records							SC01086-01140
50	Caesars Lake Tahoe Records							SC01141-01149
51	Beau Rivage Records							SC01150-01307
52	Harrah's Records							SC01308-01355
53	Casino Magic Records							SC01356-01394
54	Treasure Chest Records							SC01395-01551
55	Isle of Capri Casino Records							SC01552-01583
56	Grand Biloxi Records							SC01584-01592
57	Boom Town Records							SC01593-01615
58	Amato Grand Jury Testimony	05/05/06						No Bates #
59	Creely 302							No Bates #
60	Creely Grand Jury Testimony	03/17/06						No Bates #
61	Danos Grand Jury Testimony	03/31/06						No Bates #
62	Danos Grand Jury	08/18/06						No Bates #
63	Forstall Grand Jury Testimony	03/17/06						No Bates #

Exh. #	Description	Date	Mark	Offer	Obj.	Admit	Witness	Bates Range
64	Gardner Grand Jury	03/31/06						No Bates #
65	Levenson Grand Jury	04/07/06						No Bates #
66	Lightfoot Grand Jury Testimony	08/19/04						No Bates #
67	Lightfoot Grand Jury Testimony	09/09/04						No Bates #
68	Lightfoot Grand Jury Testimony	11/04/04						No Bates #
69	Mole Grand Jury Testimony	05/05/06						No Bates #
70	Porteous Medical Records							SC01616-01730
71	Porteous \$5000 Deposit	05/25/99						SC01731
72	Comparison 2001 Post Bankruptcy Income v. Income Reported in Petition & 2001 Actual Expenses v. Expenses in Bankruptcy	2001						SC01732-01783
73	Comparison 2002 Post Bankruptcy Income v. Income Reported in Petition & 2002 Actual Expenses v. Expenses in Bankruptcy							SC01784-01894
74	Activity History of Fleet Credit Card - Carmella Porteous (Sorted by Type of Charge)							SC01895-01898

Exh. #	Description	Date	Mark	Offer	Obj.	Admit	Witness	Bates Range
75	Activity History of Fleet Credit Card – Carmella Porteous (Sorted by Month)	01/01-06/03						SC01899-01902
76	Rhonda Danos – 1999 Deposits, Expenditures & Taxes	1999						SC01903-01908
77	Rhonda Danos – 2000 Deposits, Expenditures & Taxes							SC01909-01913
78	Grand Jury Subpoena Log							SC01914-01922
79	G. Thomas Porteous Immunity Order (DUP)	10/05/07						SC01923-01927
80	For Informational Purposes Getting Started as a Federal Judge Book Judges Information Series No. 1							
81	Crime Fraud Order	06/21/04						SC00792-00794
82	Docket Sheet for In Re: <i>Liljeberg</i> No. 2:93-cv-01794-GTP							No Bates Labels
83	Lightfoot File (Pages 33-183)							No Bates Labels
84	Charges of Judicial Misconduct	10/18/07						No Bates Labels
85	Louisiana Code of Judicial Conduct							

Exh. #	Description	Date	Mark	Offer	Obj.	Admit	Witness	Bates Range
86	Louisiana Rules of Professional Conduct	06/11/97						
87	Joseph Mole FBI Interview	07/01/04						
88	S.J. Beaulieu, Jr. FBI Interview	01/23/04						
89	Warren A. Forstall, Jr. FBI Interview	12/11/03						
90	Beau Rivage Check	04/30/01						
91	Schedule-Danos Payments for Judge Porteous 1999-2000	1999-2000						
92	Schedule-Danos Reimbursements from Judge Porteous 1999-2000	1999-2000						
93	Schedule -Danos Cash Deposits 1999-2000	1999-2000						
94	Schedule-Judge Porteous Bank Accounts Cash Deposits 1998-2000	1998-2000						
95	Schedule - Judge Porteous Bank Accounts Disbursements for Gaming 1/96-5/00	01/01/96-05/2000						

Exh. #	Description	Date	Mark	Offer	Obj.	Admit	Witness	Bates Range
96	Schedule-Judge Porteous Gaming Expenses/Charges on Credit Card 1995-2000	1995- 2000						
97								
98								
99								
100								

Attachment Two

101ST CONGRESS
1st Session

SENATE

REPORT
101-1

PROCEDURE FOR THE IMPEACHMENT TRIAL OF
U.S. DISTRICT JUDGE ALCEE L. HASTINGS
IN THE UNITED STATES SENATE

REPORT

OF THE

COMMITTEE ON
RULES AND ADMINISTRATION
UNITED STATES SENATE

TO ACCOMPANY

S. Res. 38

TO PROVIDE FOR THE APPOINTMENT OF A COMMITTEE TO RE-
CEIVE AND TO REPORT EVIDENCE WITH RESPECT TO ARTICLES
OF IMPEACHMENT AGAINST JUDGE ALCEE L. HASTINGS

AND

S. Res. 39

TO PROVIDE FOR THE FILING AND ARGUMENT OF MOTIONS BY
JUDGE ALCEE L. HASTINGS TO DISMISS ARTICLES OF IMPEACH-
MENT



FEBRUARY 2 (legislative day, JANUARY 3), 1989.—Ordered to be printed

★ (Star Print)
29-010

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON · 1989

mittee. The charge to such a committee would, then, be limited to hear testimony and receive evidence regarding those articles of impeachment that were not dismissed. The second original resolution reported herein provides for the filing and argument of motions by Judge Hastings to dismiss articles of impeachment.⁴⁷

G. RULES OF EVIDENCE

Respondent has requested that the Senate state whether the Federal Rules of Evidence or common law rules of evidence will apply in the Senate proceedings. The Committee finds that no such declaration should be made by it. Any such determination should be made by the body that hears the evidence in the case.

"The Rules of Impeachment" by Stanley Futterman, 24 Kan. L. Rev. 105 (1975) contains a discussion of the evidentiary rules used by the Senate in impeachment proceedings. Futterman states, "... the Senate has understood itself to be making evidentiary determinations under the rules of evidence applicable in courts of law and equity."⁴⁸

In the past, the Senate has determined the admissibility of evidence by looking to Senate precedents rather than court decisions. A Senate vote is the ultimate authority for determining the admissibility of evidence.⁴⁹

In the Claiborne impeachment proceedings, the House managers argued that the Senate is not bound by the Federal rules of Evidence, but they suggested that those rules should be looked to for guidance. The managers were careful to cite to the analogous federal rule when arguing motions.⁵⁰

Professor Burbank concludes that the Claiborne proceedings confirmed the Senate's wisdom in refusing to adopt detailed rules of evidence for impeachment trials and cautions against wholesale borrowing from the Federal Rules of Evidence.⁵¹ Burbank stated, "It is not hard to imagine a trial governed by a detailed body of rules becoming bogged down in technical disputes, with the ascertainment of facts the victim."⁵²

Although the Senate applies generally accepted rules of evidence, it would serve no useful purpose to declare any particular system to be supreme. *Impeachment A Handbook*, (1974) by Professor Charles Black of Yale University, discusses the entire impeachment process. Professor Black suggests that technical rules of evidence designed for juries have no place in the impeachment process.

Both the House and the Senate ought to hear and consider *all* evidence which seems relevant, without regard to technical rules. Senators are in any case continually exposed to 'hearsay' evidence, they cannot be sequestered and kept away from newspapers like a jury. If they cannot be trusted to weigh evidence, appropriately discounting for all the

⁴⁷ See Appendix C for text of S. Res. 39, 101st Congress, 1st Session.

⁴⁸ *Id.*, 112.

⁴⁹ *Cannon's Precedents*, *supra*, § 491.

⁵⁰ See S. Hrg. 99-812, Part 1, *supra*, 70-71, 73.

⁵¹ Burbank, "Removal of Federal Judges", *supra*, 692.

⁵² *Id.*, 693.

factors of unreliability that have led to our keeping some evidence away from juries, then they are not in any way up to the job, and 'rules of evidence' will not help.⁵³

Simpson in "Federal Impeachments", *supra*, discussed rules of evidence in impeachment proceedings. Simpson noted:

the Senate has invariably received all the evidence which it deemed relevant, from any witness who had personal knowledge of the facts, no matter by whom it was to be proved, and left its weight to be determined upon final consideration.⁵⁴

The Senate must retain its freedom to review evidence issues as they present themselves. The Senate should not restrict itself unnecessarily by making its decision in a vacuum, before the trial has even begun.

H. OTHER FAIR TRIAL ISSUES

The House Managers have recommended that the impeachment committee's proceedings should be videotaped to provide an additional means to examine the credibility of witnesses and to overcome other objections to impeachment proceedings before a committee instead of before the full Senate. The Claiborne proceedings were televised to all Senate offices and videotapes were available to Senators.

For the reasons set forth fully in its discussion of the use of an impeachment committee, the Committee believes that the proceedings of the impeachment committee should be televised to all Senate offices and videotaped, and that such videotapes should be made available to Members so that they may examine the proceedings as their schedules permit, without disruption of the other legislative responsibilities of the Senate during this trial.

The Committee finds that the Senate can also assure that Senators have an opportunity to familiarize themselves with the case by delaying floor consideration of the articles of impeachment for a period of time after the parties have concluded their cases before the committee.

During the Claiborne trial, concern was expressed about the lack of time Senators had to review the record before full Senate consideration of the case. Respondent intimates that he will not receive a fair trial if a committee is used to receive evidence because the Senators will not take time to examine transcripts or videotapes prior to full Senate action.

Allowing a period for weighing the evidence will remove even the suggestion that the Senate does not wish to devote the necessary time to the case. By the same token, providing a period for reviewing the evidence will allow the nation's business to go forward. Such a procedure is common practice in the Senate. Hearings are routinely held months before legislation is marked up and voted upon in committee. Frequently, the full Senate vote is taken months after the legislation is reported. In the context of impeach-

⁵³ *Id.* 18 (emphasis in the original)

⁵⁴ *Id.* 819

Attachment Three

United States Senate

WASHINGTON, DC 20510

IMPEACHMENT TRIAL COMMITTEE**DISPOSITION OF PRETRIAL ISSUES**

Upon consideration of the written submissions of the parties on pretrial issues and the oral argument on April 12, 1989, the committee has authorized the chair to issue the following rulings on behalf of the committee:

Preliminary Witness Lists

First, on three occasions, beginning on August 10, 1988, the Committee on Rules and Administration asked the parties for preliminary lists of witnesses with a description of the general nature of the testimony that is expected from each witness. The Rules Committee expressly stated that neither side would be precluded, by the submission of this preliminary information, from requesting subpoenas for other witnesses. On September 6, 1988, the House submitted a list of twenty-three witnesses that it anticipates calling. The House briefly described the nature of each witness's proposed testimony. On January 17, 1989, the House supplemented that list with six additional witnesses. Judge Hastings did not provide to the Rules Committee a list of his proposed witnesses in these Senate proceedings. Neither has Judge Hastings provided to this committee a preliminary list of the witnesses that he intends to call before us, other than to refer to material which he had provided last year to a subcommittee of the House Committee on the Judiciary.

(281)

It is imperative that Judge Hastings now provide his preliminary witness list without any further delay. The committee requires the list in order to complete its consideration of pretrial issues, including the fixing of an appropriate date to begin evidentiary hearings. Accordingly, Judge Hastings is directed to provide to the committee by noon on April 19, 1989, a preliminary witness list that identifies in good faith the witnesses that he intends to call before this committee. The witness list should also briefly state, in detail comparable to that already provided by the House for its anticipated witnesses, the nature of the testimony that Judge Hastings expects each listed witness would provide. This is to be a preliminary list. Judge Hastings may add, by showing good cause for not including them on the preliminary list, additional names when he submits his final witness list. In the absence of a showing of good cause, the committee may exclude the testimony of any witness who is not listed and described in the preliminary witness list.

The House has indicated that it may have additional witnesses. To the extent that those additional witnesses are now known to the House, the House should supplement its preliminary list by noon on April 19, 1989.

Motion In Limine

Second, the House has moved in limine to exclude five categories of evidence as irrelevant.

The first category concerns the motivations of persons who investigated Judge Hastings in 1961 and then who prosecuted him in United States v. Hastings, Cr. No. 81-596-Cr-ETG. The third category concerns the motivations of persons who investigated the matters addressed by Grand Jury No. 86-3 (Miami) concerning the alleged disclosure by Judge Hastings of confidential wiretap information.

Judge Hastings correctly notes that the House has placed on its witness list several assistant United States attorneys and agents of the Federal Bureau of Investigation who would testify in connection with either the bribery and perjury allegations or the wiretap matter. Judge Hastings asserts that the House motion is premature. He also asserts that he should be able to inquire into the motivation and bias of the witnesses against him. As Judge Hastings has asserted a tenable basis for some degree of latitude in cross-examining the witnesses that the House will call, the committee denies at this time this portion of the House's motion. To the extent that Judge Hastings proposes to inquire into the motivations of persons who investigated and prosecuted him for a purpose other than impeaching witnesses that the House will call, the House motion is premature in

the absence of a firm indication from Judge Hastings, through the filing of a witness list, that he intends to call any such witnesses. We wish to make clear nonetheless that our denial at this time of this portion of the House motion should not be understood to invite an open-ended inquiry into the motivations of federal prosecutors and investigators. Rather, any such inquiry must be limited to evidence that the investigations were conducted in a manner intended to mislead a court or trier of fact as to Judge Hastings' guilt or innocence.

Categories two and four concern the motivations of persons who initiated, investigated, and considered the complaints that were filed against Judge Hastings in March, 1983, and September, 1985, with the Eleventh Circuit under the Judicial Conduct and Disability Act of 1980. Judge Hastings contends that this aspect of the House motion also is premature.

The issues that are presented by the articles concern Judge Hastings' conduct, not the conduct of members of the judicial branch or persons employed by it. Judge Hastings has made no showing that evidence in categories two and four would be relevant to the articles of impeachment. Moreover, a grant of the House motion with respect to categories two and four should help to focus the parties' preparation for trial on issues that will be germane to the Senate's consideration of the articles. The motion to exclude

evidence of the matters described in categories two and four is granted.

The fifth category in the House motion in limine is cumulative evidence on Judge Hastings' general character and reputation. We agree with Judge Hastings that this portion of the House motion in limine is premature. We expect that Judge Hastings will be mindful of the limitations that the committee placed on the number of character witnesses, and the total length of character testimony, in the Claiborne proceedings, and that, in composing his witness list, Judge Hastings will recognize the need to avoid cumulative evidence. We can address at a later date any question which arises about the need to impose limits on that testimony.

Documentary Discovery

Third, Judge Hastings has moved for extensive pretrial discovery. He advocates that discovery be based on contemporary ideas about discovery in federal civil judicial proceedings. The House has proposed a scope of discovery that is modeled to a greater extent on federal criminal judicial proceedings. The House proposes to provide to Judge Hastings any exculpatory evidence that it possesses. The House also proposes that each party provide to the other party the documents that it proposes to offer in evidence, prior sworn, adopted, or approved statements of witnesses that each proposes to call, and substantially verbatim and

contemporaneously recorded statements of witnesses that each intends to call. The discovery proposed by the House should be completed as promptly as possible. We reject, however, the divergent theoretical limits -- expansive in Judge Hastings' view and constricted in the House's view -- that each side has advocated.

The House has expressed a concern about one House of Congress directing another House to produce records. We need not address at this time whether the Senate has that power in an impeachment proceeding, because we think that it should be sufficient to state principles and a schedule to guide these proceedings:

(a) To the extent that the parties have had a disagreement about photocopying, we recommend to the House that the issue be resolved in Judge Hastings' favor and that the House provide to Judge Hastings copies of all documents that the House has no objection to providing on the basis of their content. To facilitate Judge Hastings' response to the House's proposed stipulations, a matter that will be discussed below, the House should provide those copies by April 21, 1989, a week from today's order.

(b) The House -- which has proposed to provide exculpatory materials, certain prior statements of witnesses, and documents and other tangible evidence that it intends to introduce in evidence -- has indicated that it has provided

most but not all of that material to Judge Hastings. The House would like to defer further production until it receives equivalent material from Judge Hastings. We will be requiring comparable disclosure by Judge Hastings, but the production to Judge Hastings should not be delayed while that occurs. Again, because we will be requiring responses to the House's proposed stipulations, the House should provide this material to Judge Hastings by April 21.

(c) Concerning other documents, the sharing of information should be guided by a broader principle than that advanced by the House in its offer to provide exculpatory evidence and the prior sworn, adopted, approved, or substantially verbatim and contemporaneously recorded statements of witnesses. In addition to the interests of the House in its role as advocate for the articles of impeachment and the interests of Judge Hastings in defending against those articles, the Senate has an interest in the development of a record that fully illuminates the matters that it must consider in rendering a judgment that under the Constitution only the Senate may make. We therefore ask the House -- for documents that it has obtained from elsewhere in the government that are responsive to a particularized request from Judge Hastings -- to determine whether there are specific objections, such as the need to honor promised confidences to people who may be at risk, to production to

Judge Hastings. In the absence of specific objections by the House or by the governmental entity that provided the material to the House, which should be articulated in writing so that the parties and the committee may be apprised of them, the special constitutional process that we are now engaged in will be served best by the fullest disclosure possible. It may be that for some documents an appropriate course of action would be to provide them to the committee for an evaluation of their sensitive nature, if any, and a determination by the committee whether any restrictions should be placed on the terms of access to them. Again, because of the schedule that will be set forth below for responses to stipulations, the House should respond by May 3.

(d) Judge Hastings also has a burden that he has not yet met. It will be necessary for him to do more than simply demand everything that other people have. In order to facilitate the process that we are asking the House and the other branches to undertake, Judge Hastings should identify, with far greater particularity than he has to date, the records that are germane to issues in these proceedings. Also, if it would be of assistance to the holders of documents in determining their responses, he should articulate to them the basis for his requests. To enable the House to respond by May 3, Judge Hastings should submit his particularized requests by April 26.

(e) Neither the Department of Justice nor the counsel or the members of the Investigating Committee of the Judicial Council of the Eleventh Circuit are before us. If Judge Hastings has requests for documents from either the Department, including the Federal Bureau of Investigations, or the Judicial Council, he should promptly make particularized requests to them by April 26. With knowledge of the committee's interest in the fullest disclosure possible, we would appreciate knowing of the Department's and the Council's responses at the earliest possible time.

(f) Judge Hastings should provide his reciprocal discovery to the House by May 10, including all documents, tapes, and other tangible evidence he intends to offer in evidence, and sworn, adopted, approved, or substantially verbatim statements of witnesses that Judge Hastings intends to call.

Depositions

Fourth, Judge Hastings has asked that the Senate utilize its subpoena power to enable him to take depositions in advance of the committee's hearings. He has attached to his most recent request a list, which he has denominated a provisional list, of twenty-four Department of Justice attorneys and Federal Bureau of Investigation officials and agents. The list is taken from a list of provisional witnesses that Judge Hastings had submitted last year to a subcommittee of the House Committee on the Judiciary.

The committee knows of no precedent for the pretrial examination of witnesses in connection with a Senate impeachment trial. Nevertheless, the committee will give further consideration to Judge Hastings' request for depositions after receiving from him a statement that includes the following information: a list of proposed deponents; a proffer of the testimony he expects to elicit from each proposed deponent and the relevance of that testimony; whether the proposed deponent has testified or provided statements in prior proceedings and whether Judge Hastings has received or has had access to any transcripts or recorded statements; whether Judge Hastings has asked the proposed deponent to provide information voluntarily and, if he has, the response of the proposed deponent; and, if the committee provides for depositions but limits their number, what priorities Judge Hastings places among the depositions that he is requesting.

If Judge Hastings wishes to pursue his request for depositions, he should submit this statement by April 28, 1989.

It is the committee's hope and expectation that if either the House or Judge Hastings seeks an opportunity to obtain information from the Department of Justice, including the Federal Bureau of Information, that the Department and the Bureau will cooperate voluntarily to provide relevant information.

Stipulations

Fifth, the House, on December 15, 1988, served an original and, on March 31, 1989, served a revised proposed stipulation of facts. The revised proposal reorganizes the original proposed stipulation of facts into fifteen categories. The House also served on December 15, 1988, a proposed stipulation of documents which asked that the parties stipulate that each of the listed documents is genuine. The proposed documentary stipulation also proposed other stipulations for designated categories of documents. The December 15, 1988 submission by the House on documentary stipulations stated the proposed stipulations did not preclude pertinent objections to the admissibility of the documents listed by the House based on matters not addressed in the stipulations.

On January 17, 1989, the House proposed that the Senate adopt a rule that any proposed stipulation of fact will be accepted as true unless the opposing party files a written objection, including a proffer as to why the proposed stipulation should not be taken as true. The House asked for a parallel rule on the authenticity of documents.

An early resolution of factual questions and questions about the authenticity and admissibility of documents that are not in dispute will enable the parties and the committee to focus their time and energies on matters that are truly in

disagreement. Also, the committee has been directed by the Senate to report to it on facts that are uncontested.

Accordingly, the committee accepts the House proposals. We direct Judge Hastings to respond to the House's proposed revised stipulations of fact, filed on March 31, 1989, by admitting their truth or serving and filing a specific objection that includes a proffer as to why the proposed stipulation should not be taken as true. With respect to documents, we direct Judge Hastings to respond to the House's proposed documentary stipulations, filed December 15, 1988, by admitting the matters set forth in that submission and by admitting the admissibility of the documents listed by the House, or by serving and filing a specific objection that includes a proffer as to why the proposed stipulation concerning each document should not be taken as true and the particular document admitted into evidence.

Judge Hastings has had nearly four months to evaluate the House's proposed stipulations. We direct that Judge Hastings' response be submitted no later than May 10, 1989. This should be a reciprocal process. Although Judge Hastings' has not proposed stipulations of his own, he may do so by May 10. If Judge Hastings does submit proposed stipulations by that day, the House should respond to them by May 24. The parties should engage in this process with an

eye towards resolving problems. Consequently, if a disagreement about a proposed stipulation can be resolved by redrafting the stipulation to be more accurate, or can be resolved by providing access to a specific document, then we would expect the parties to work together to settle differences between them.

Evidentiary Principles

Sixth, the parties have expressed an interest in the evidentiary principles that will govern these proceedings. The committee's task is to receive and report evidence to the Senate. The Senate reserves the power to determine the competency, relevancy, and materiality of the evidence received by the committee. The committee is not bound by the Federal Rules of Evidence, although those rules may provide some guidance to the committee. Members of the Senate sit both as judges of law and fact. Precise rules of evidence are not needed in an impeachment trial to protect jurors, lay triers of fact, from doubtful evidence. In the end, the task of members of the Senate will be to weigh the relevance and quality of the evidence.

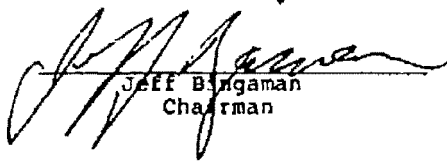
Final Pretrial Statements

Lastly, the parties should file final pretrial statements by a date that the committee will designate when it issues an order setting a date for the commencement of testimony. These statements should include a final list of

witnesses with a brief statement of the nature of each witness's proposed testimony. The parties should also submit marked exhibits that each proposes to offer. Further, each party should set forth to the committee the legal principles that each believes is applicable to each article of impeachment, or, if appropriately grouped, set of articles. Although the committee will not reach conclusions of law, it is important for the committee, in determining the relevancy of evidence, to know from the parties the legal theories upon which each is proceeding. We will provide more detailed instructions to the parties about the contents of these pretrial statements.

Deferred Matters

The committee is continuing to consider Judge Hastings' application for defense funds. The committee is also continuing to consider a schedule for its evidentiary hearings. The committee expects to issue an order or orders on these matters within a week.


Jeff Bingaman
Chairman

Dated: April 14, 1989

Attachment Four



PHONE: (202) 224-5473
TELECOMER: (202) 224-5873

IMPEACHMENT TRIAL COMMITTEE
(ON THE ARTICLES AGAINST JUDGE ALCEE L. HASTINGS)
HART SENATE OFFICE BUILDING, ROOM 511-9020
WASHINGTON, DC 20510

IMPEACHMENT TRIAL COMMITTEE
EIGHTH ORDER

In its Fourth Order, dated May 24, 1989, the Committee noted the desirability, in circumstances consonant with fairness to the parties, of permitting the prior recorded testimony of some witnesses to be introduced into the record in place of live examinations. It is the Committee's belief that the use of this procedure, especially where the testimony related to facts not in substantial dispute or came from witnesses whose credibility is not questioned, will further the creation of a coherent record for use by the Senate.

The parties were directed to, and did, identify for the Committee the prior testimony they desired to offer into evidence. The Committee has reviewed all written submissions of the parties on this topic, and has considered their oral arguments as well. The Committee recognizes the general objection on the grounds of hearsay made by Judge Hastings to the receipt of any prior testimony as substantive evidence (somewhat modified in his most recent submission), but as noted in the Committee's disposition of pretrial issues on April 14, 1989, neither it nor the Senate is bound in these proceedings to strict judicial rules of evidence. (The

Committee notes that even under the Federal Rules of Evidence, hearsay may be received if the court is satisfied that the interests of justice are served by its admission.)^{1/} On the other hand, the Committee does not believe it appropriate to admit prior testimony into evidence on key points where credibility, context or interpretation are in dispute -- particularly where the opposing party has not had an opportunity for cross-examination.

The Committee also does not believe it appropriate to address at this time objections, such as relevance, competence, prejudice, privilege or hearsay, to the content of any proffered prior testimony, and expressly reserves all such decisions until the commencement of the evidentiary proceedings on July 10.

Subject to the foregoing, the Committee has decided that it will receive certain prior testimony as substantive evidence, but will do so only where the prior testimony is offered in place of -- and not in addition to -- a party's calling that witness in its own case. The Committee's decision to receive prior testimony from certain witnesses does not preclude those witnesses being called by the opposing party, with appropriate opportunity then for cross-

^{1/} Rule 803(24), F.R.Ev.; see also, Rule 804(b)(5), F.R.Ev.

examination. Accordingly, the Committee rules that:

1. The entire testimony of Richard Lowe, Willie James Washington, and Laverne Boone before the Investigating Committee of the Eleventh Circuit ("IC") will be received into evidence. Judge Hastings has waived any specific objection to the testimony of these airline employee witnesses, whose testimony is limited solely to the meaning of certain airline records. The Committee believes that their testimony is not subject to substantial dispute, and notes that if there are further matters that Judge Hastings wishes to elicit from these witnesses, the Senate will at his request issue subpoenas so that he may do so in the presentation of his own evidence.

2. Neither the prior grand jury nor the IC testimony of Daniel Simons will be received into evidence. Judge Hastings has never cross-examined Mr. Simons,^{2/} and Simons' testimony, which directly describes Judge Hastings' actions in issuing a forfeiture order that the House alleges was central to the bribery scheme, is more than peripheral. The

^{2/} The Committee notes the House's position that Judge Hastings had, but declined, the opportunity to cross-examine Mr. Simons before the IC, but is more guided by its reluctance to have the record here contain significant substantive evidence against Judge Hastings from this witness who was not subject to cross-examination on behalf of Judge Hastings. Notwithstanding this ruling, however, the Committee remains of a general view that a party's failure to exercise an opportunity to cross-examine may appropriately be considered a waiver of that opportunity.

House is invited to consider whether other means which would allow Judge Hastings an opportunity of cross-examination, such as a telephonic deposition, might be employed to provide the testimony of Mr. Simons.

3. The complete trial testimony of Madeline Petty in United States v. Hastings and pp. 220, ll. 5-6; 222, ll. 3-7; and 224, ll. 7-11 from her IC testimony will be received into evidence, subject to Judge Hastings' right to call her as his own witness. The Committee is substantially influenced by the facts that Judge Hastings did have an opportunity to cross-examine Ms. Petty at his trial; that the testimony regarding Ms. Petty's travel to Las Vegas with Mr. Borders is not disputed; and that the details in her IC testimony regarding her phone number and non-acquaintance with Dredge are not disputed.

4. The IC testimony of Neal Sonnett and Joel Hirschhorn will not be received into evidence. The Committee has reviewed the proffered testimony with care. In both instances, the Committee feels, the testimony involves matters where the context and interpretation of particular events may be significant, and where the Committee is reluctant to permit its record to be based on ex parte examinations. Particularly with respect to Mr. Hirschhorn, the Committee notes the repeated attorney-client privilege

issues which his testimony raised, and feels that in these proceedings it would be better to have such testimony as the House might desire from this witness offered directly by the witness in Judge Hastings' presence.

5. The IC testimony of Carolyn McIver, Andrew Chisolm, and Eleanor Golar-Williams which relates to whether Hemphill Pride could be reached at their telephones will be received into evidence, if these witnesses are not called to testify. The Committee notes that Judge Hastings has, in his Answer to Impeachment Articles X through XIII, admitted the substantial accuracy of this testimony, and sees no reason why these three witnesses should be required to appear as live witnesses on this issue unless Judge Hastings wishes to call them as a part of his case. To the extent that any other issue is sought to be proven from these witnesses, however, the Committee will not receive their IC testimony for that purpose.

6. The IC testimony of Louima Romano will not be received into evidence. Judge Hastings has never cross-examined this witness, and the Committee notes that much of her proffered testimony was vague, and became precise only in response to leading questions.

7. The trial testimony of Paul Rico, Benjamin Daniel Brown, Charles T. Duncan, Mildred Hastings, Shirley Pride,

Simon Stephen Selig III, and Dudley Williams in United States v. Hastings and United States v. Borders will not be received into evidence. These are witnesses whom the opposing party has expressed a desire to examine, and if evidence from them is to be a part of the case here, the opposing party should have an opportunity to cross-examine. To the extent that any of these witnesses are unavailable, the Committee is willing to reconsider its ruling under standards similar to those in Federal Rule of Evidence 804.

8. The entire trial testimony of I.J. Cunningham, Willie E. Gary, Lisa Goldstein, Barbara Katzen, Carolyn Lewis, Alvoyd Merritt, the Honorable James C. Paine, Herman C. Perry, Mildred Pride, Herbert O. Reid, Frank Romano, Shirley Ross, Paul Snead, Ralph Stevenson, Delano Stewart, and Barbara Whiting-Wright in United States v. Hastings and United States v. Borders will be received into evidence. This testimony has been proffered by Judge Hastings, and the House has not objected.

9. Judge Hastings' application to include in the record as substantive evidence the entire trial records of both United States v. Hastings, No. 81-596-CR-ETG (S.D. Fla. 1983) and United States v. Borders, No. 82-75-A (N.D. Ga. 1982) is denied. The Committee sees no reason to further expand the record here with volumes of transcripts and

hundreds of exhibits from two separate proceedings. The Committee has been, and continues to be, willing to accept specific proffered items of testimony and documentary evidence, but believes that acceptance of the full record of two other trials as substantive evidence would be more confusing than informative.

The Committee defers ruling on Judge Hastings' alternative proffer of the entire Hastings trial record not as substantive evidence, but rather to show that the 1981 bribery allegations and the false statement issues arising out of his defense of them were presented fully and fairly to the jury which acquitted him. Judge Hastings argues that this should be a key, if not dispositive, fact in the Senate trial; the House managers assert, to the contrary, that this evidence has no relevance whatever, and Judge Hastings should be convicted or acquitted based solely on the evidence adduced here.

The Committee does not believe it appropriate to decide an important issue of weight and relevancy for the Senate in the context of ruling on whether certain prior testimony may be received as substantive evidence. It may be that Judge Hastings' argument can properly be put to the full Senate for such weight as any Senator chooses to give it. At this time the Committee notes that a decision to include the

entire Hastings trial record in its "report of evidence" to the Senate may have the effect of commingling the evidence admissible generally with a very similar body of evidence admitted only for limited purposes. The Committee invites Judge Hastings to make an alternative suggestion of a mechanism for presenting his argument regarding the effect, if any, of his 1983 acquittal to the full Senate -- for example, through creation of a summary of witnesses and exhibits in the 1983 trial for entry into the record here -- without the potential for confusion that may be inherent in duplicating the entire prior trial record.

B. Documents

In its Fifth Order, dated June 8, 1989, the Committee directed the parties to exchange lists and copies of their intended exhibits and, by not later than June 27, 1989, to serve notice of any objection to the opposing party's exhibits on the basis of authenticity, genuineness or status as a business record. The Committee's order provided that, in the absence of a "reasoned and specific objection" from the opposing party, the offering party would not be required to prove authenticity, genuineness or status as a business record for any document so identified.

The House has complied with the Committee's order by providing a list and copies of exhibits in a timely fashion. Judge Hastings has not. Accordingly, the Committee rules that the House shall retain the right to object on any basis to documentary evidence offered by Judge Hastings, including objections based on a position that Judge Hastings' failure to supply his exhibit list in a timely fashion has caused unfair surprise.

Judge Hastings has, however, made specific objections to some of the proffered House exhibits: Nos. 1, 4, 10, 15, 23, 38b, 43b, 44b, 45b, 46b, 47b, 48b, 49b, 50b, 51b, 52b, 53b, 54b, 55b, 56b, 57b, 58b, 59b, 60b, 61b, 62b, 64b, 65b, 66, 67, 120, 123, 124, 128, 129, 139, 141, 145, 147, 175b, 185b, 186b, 187b, 190, 192, 193b, 194b, 201, 202, 203, 206, 207, 208 and 209. Accordingly, all other proffered House exhibits will be received as genuine, authentic, and where appropriate, as regularly recorded business entries.

With regard to Judge Hastings' specific objections to proffered House exhibits, the Committee rules as follows:

Exhibits 1, 15, 66, 67, 120, 123, 124, 128, 129, 139, 141, 145, 147, 192, 201, 202, 203, 206, 207, 208, and 209:
Ruling reserved, subject to argument before the Committee.

Exhibits 4, 175b, 190: Exhibits will be accepted as genuine, authentic, and, where appropriate, as regularly recorded business entries.

Exhibits 10, 23: Exhibits accepted if legible.

Exhibits 38b, 43b, 44b, 45b, 46b, 47b, 48b, 49b, 50b, 51b, 52b, 53b, 54b, 55b, 56b, 57b, 58b, 59b, 60b, 61b, 62b, 64b, 65b, 185b, 186b, 187b, 193b, and 194b: Respondent objects to the admission of these transcripts of tape recorded conversations on the grounds that the transcripts are "inaccurate and incomplete" as well as on "other [unspecified] grounds." The Committee recognizes that the tapes themselves are the best evidence of the contents of recorded conversations, but believes that the transcripts tendered by the House are appropriately received as additional evidence.^{3/} Accordingly, these documents will be received. Leave is hereby given to Judge Hastings to submit any corrections he may wish made to the transcripts tendered by the House, and those corrections will be received as

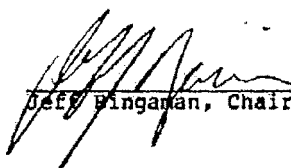
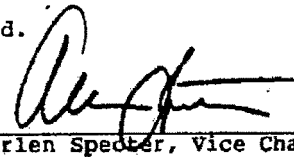
^{3/} Although not binding on the Committee or the Senate, this procedure is commonly followed in the courts. See e.g., Govt. of Virgin Islands v. Martinez, 847 F.2d 125, 128 (3d Cir. 1988); United States v. Rengifo, 789 F.2d 975, 980-83 (1st Cir. 1986), and cases cited therein.

separate Hastings exhibits.

C. Hearing Procedures

In order to provide for orderly proceedings, the parties are requested to alert the Committee to any legal issues or evidentiary matters that they anticipate may require ruling by the Committee and to submit short memoranda in support of their position. The parties should attempt to so advise the Committee at least three days in advance of when the need for a ruling is anticipated.

Judge Hastings is directed promptly to advise the House and the Committee of the order in which he anticipates that his witnesses will be called.


Jeff Bingaman, Chairman
Arlen Specter, Vice Chairman

Dated: July 10, 1989

**In The Senate of The United States
Sitting as a Court of Impeachment**

In re:)
Impeachment of G. Thomas Porteous, Jr.,)
United States District Judge for the)
Eastern District of Louisiana)

**JUDGE G. THOMAS PORTEOUS, JR.'S OPPOSITION
TO THE HOUSE OF REPRESENTATIVES' MOTION TO ADMIT TRANSCRIPTS
AND RECORDS FROM PRIOR JUDICIAL AND CONGRESSIONAL PROCEEDINGS**

NOW BEFORE THE SENATE, comes Respondent, the Honorable G. Thomas Porteous, Jr., a Judge of the United States District Court for the Eastern District of Louisiana, and opposes the House's Motion (filed on July 21, 2010, the "Motion") to admit as evidence in this proceeding the prior testimony and records from (1) the Fifth Circuit Judicial Council Special Committee hearing (the "Fifth Circuit Hearing") and (2) the House Impeachment Task Force hearings (the "House Task Force Hearings"). In support, Judge Porteous states as follows.

Introduction and Summary

Unlike all other modern judicial impeachments, this case comes to the Senate without a prior criminal trial record. Indeed, the Justice Department, after years of investigation and an extensive grand jury inquiry, expressly declined to bring any criminal charges against Judge Porteous. The prior proceedings in this case therefore consist solely of the Fifth Circuit Hearing and the House Task Force Hearings. Neither of these proceedings, however, was subject to the due process protections and requirements of a trial, including – critically – the constitutional right to confront and conduct full and fair cross-examination of adverse witnesses. Judge Porteous was forced to represent and defend himself without the benefit of counsel at both the Fifth Circuit Hearing and part of the House Task Force Hearings. The one-sided testimony

elicited at those proceedings falls well short of any due process standard and should be excluded from the Senate trial. Judge Porteous has never had an adequate opportunity, guaranteed by the Constitution, to confront fully the witnesses who testified against him in the Fifth Circuit and House Hearings, which resembled grand jury proceedings aimed at securing an indictment. Those proceedings had little in common with the kind of adversarial examination of evidence necessary for a fair trial. The exclusion of testimony and records from such limited past proceedings, which is supported by prior precedent, serves the interests of justice and fairness.

The Senate is being asked here to approve an abbreviated trial where the accused has been given less than half the average period for an impeachment trial, has been denied discovery given to prior impeached federal judges, and is being prosecuted on the basis of testimony elicited in insufficiently adversarial prior proceedings. Unlike in previous modern impeachments, the Senate cannot draw reliable testimony from any prior trial record. The Senate's evidentiary hearing will be Judge Porteous's first and only chance at anything resembling a fair trial. In opposing the House's Motion, he seeks only to preserve the fairness of that trial, just as any member of this body would do if faced with similar charges, or consequences. The Senate has historically protected the rights of the accused by barring shortcuts and circumventions attempted by the House Managers,¹ and should continue to do so here.

Factual Background

The factual background relevant to the House's Motion and this Opposition is set out in detail in Judge Porteous's Motion to Exclude Prior Testimony and Limit the Presentation of

¹ No disrespect toward the House is intended by this statement. The Constitution charges the House with the prosecutor's role in impeachments. U.S. CONST. art. I, § 2, cl. 5 & § 3, cl. 6; see also Jonathan Turley, *Congress As Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735 (1999).

Testimonial Evidence to Live Witnesses (filed on July 21, 2010), which Judge Porteous incorporates herein by reference. The key facts can be summarized as follows:

- The U.S. Department of Justice declined to pursue *any* criminal charges against Judge Porteous following a nearly decade-long criminal investigation, which included extensive FBI witness interviews, numerous grand jury subpoenas, and voluminous grand jury testimony.
- Nevertheless, the Justice Department submitted a complaint to Fifth Circuit Chief Judge Edith Jones, who appointed a Special Investigatory Committee (the “Special Committee”), composed of herself, Fifth Circuit Judge Fortunato Benavides, and District Judge Sim Lake, to investigate the Justice Department’s complaint.
- Despite her involvement in denying Judge Porteous’s earlier disability motion, and her appointment of herself as a “complainant” in the Special Committee proceedings, Chief Judge Jones refused Judge Porteous’s request that she recuse herself.
- Less than two weeks before the scheduled start of the Fifth Circuit Hearing, Judge Porteous’s counsel withdrew.
- Though Judge Porteous repeatedly asked for time to retain new counsel, the Special Committee denied his requests and forced him to go forward at the Fifth Circuit Hearing without counsel, despite a clear requirement that he be permitted to have counsel in such a proceeding.
- At the Fifth Circuit Hearing, the Special Committee, through its investigator Ronald Woods, a former U.S. Attorney, called a number of witnesses to testify, including Judge

Porteous – who, after refusing to testify voluntarily, was issued statutory immunity at the last minute and compelled to testify.²

- The Special Committee thereafter issued a report, which, following review by the Judicial Council and Judicial Conference, led to an impeachment referral to the House.
- The House directed its Judiciary Committee to investigate, which it did through a specially-appointed House Impeachment Task Force.
- In addition to requesting and receiving numerous records from (among others) the Justice Department and the Fifth Circuit (including grand jury testimony and a transcript of Judge Porteous’s immunized Fifth Circuit Hearing testimony), the House Impeachment Task Force staff “interviewed over 70 individuals and took over 25 depositions” – none of which Judge Porteous was permitted to attend. (*See* H.R. Rpt. No. 111-427, at 7 (2010).)
- In November and December 2009, the House Impeachment Task Force held four hearings concerning Judge Porteous. As the House Impeachment Task Force made clear, these hearings “[i]d] not constitute a trial in any sense,” were not subject to “the procedural rules that would govern a federal trial,” and afforded Judge Porteous only a limited right of participation, including only “ten minutes of examination” for the witnesses that the House decided to call. (*See* Letter from A. Schiff and B. Goodlatte to R. Westling dated November 6, 2009; House Task Force Hearing Transcript, Ser. No. 111-43, at 5 (Nov. 17, 2009).)

² The impropriety of the House’s attempt to use Judge Porteous’s prior immunized testimony in this proceeding is the subject of a separate motion (filed on July 21, 2010) and opposition (being filed concurrently herewith). As detailed in those filings, it is entirely inappropriate for the House to attempt to rely upon Judge Porteous’s immunized testimony before the Fifth Circuit as support for its request to introduce other prior testimony in this proceeding. (*See* House Motion at 6.)

- During the first House Task Force Hearing, Representative Schiff admonished “Judge Porteous and his counsel that no objections or other interruptions in the testimony will be permitted,” and explained that the House’s impeachment inquiry “is not a trial, but is more in the nature of a grand jury proceeding.” (House Task Force Hearing Transcript, Ser. No. 111-43, at 5 (Nov. 17, 2009).)
- The House subsequently approved four articles of impeachment against Judge Porteous (*see* H.R. Res. 1301), which it presented to the Senate, and which led to this proceeding.
- The House has preliminarily designated either eighteen or nineteen witnesses to testify before the Senate³ and now seeks to admit (among other things) prior testimony elicited from these (and other) individuals during the Fifth Circuit Hearing and the House Task Force Hearings.

Argument

Contrary to the House’s assertion, admitting all of the prior testimony and materials from the Fifth Circuit Hearing and the House Task Force Hearings will not provide the Senate with a complete record of the witnesses’ testimony.” (House Motion at 5-6.) Indeed, that material was created outside of the adversarial judicial process that is specifically designed to guarantee accurate and reliable evidence. Rather than establish the alleged facts in an adversarial process, the House seeks to substitute decidedly one-sided prior testimony and other material for the record of the Senate, which would otherwise be developed in an equitable process subject to rigorous cross-examination.

It is particularly notable that the House is not seeking to admit all of the grand jury testimony (which led to the Justice Department’s decision not to pursue any charges against

³ See House Preliminary Witness Designation, filed June 8, 2010, and House Supplemental Filing thereto, filed June 30, 2010.

Judge Porteous) or any of the testimony from depositions and interviews that the House Impeachment Task Force unilaterally set and exclusively attended. By excluding this testimony from its request, the House recognized that testimony was inherently untrustworthy, incomplete, and defective. (See Letter from the House Managers to the Senate Impeachment Trial Committee Chairman and Vice Chairman dated April 13, 2010, stating that “[a]t this point in time the House does not anticipate seeking to admit testimony or witness statements that have not been subject to cross-examination.”) Yet the House now seeks to admit similarly tainted prior testimony, which was elicited in earlier proceedings where Judge Porteous and his attorneys had no opportunity to conduct even minimally adequate cross-examination.⁴ Such untested testimony, based on selective questioning by Judge Porteous’s adversaries, has no place in a fair Senate trial.

I. Testimony from the Fifth Circuit Hearing Should Be Excluded

The Sixth Amendment to the Constitution guarantees a fundamental American right – namely that, “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him....”⁵ U.S. CONST. amend. VI. The “main and essential purpose of confrontation is to secure ... the opportunity of cross-examination.” *Davis v. Alaska*, 415 U.S.

⁴ Indeed, the Senate Impeachment Trial Committee specifically highlighted the “limited opportunities for examination that [Judge Porteous] had” in the Fifth Circuit and House Task Force Hearings as a basis for allowing him to take four depositions in advance of the evidentiary hearing. (See Disposition of Judge G. Thomas Porteous, Jr.’s Motions to Compel and for Depositions, dated July 19, 2010, at 2.)

⁵ Though the parties may debate the ultimate scope of the phrase “criminal prosecutions,” this Senate impeachment proceeding is sufficiently similar to a criminal prosecution that the Sixth Amendment rights to confront and cross-examine adverse witnesses should attach. Indeed, the House (in keeping with its past precedent) framed the Articles of Impeachment against Judge Porteous with reference to the criminal code, and the Senate (in keeping with its past precedent) has endeavored to provide a fair and equitable proceeding, which ensures both procedural and substantive due process. Moreover, the Senate is pursuing this proceeding in order to decide whether it will “convict” Judge Porteous and strip him of the constitutional office that he is otherwise entitled to hold for life.

308, 315-16 (1974) (citations omitted). Cross-examination is critically important because it is “the principal means by which the believability of a witness and the truth of his testimony are tested.” *Id.* at 316. Indeed, according to the Supreme Court, “the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal.” *Pointer v. Texas*, 380 U.S. 400, 404-05 (1965). Without rigorous cross-examination, a witness’s perceptions, memory, biases, prejudices, motives, and character for truthfulness will not be sufficiently tested and exposed. Therefore, the U.S. Supreme Court has held that prior testimonial statements can be admitted in a later proceeding only where (1) the witness is unavailable to testify at that later proceeding and (2) the individual against whom the prior testimony will be used had a full and fair opportunity to cross-examine the witness under oath when the earlier testimony was elicited. *Crawford v. Washington*, 541 U.S. 36, 51-52, 59 (2004). The House cannot demonstrate either of these requirements.

First, the House has neither asserted nor demonstrated that any of the witnesses who testified during the Fifth Circuit Hearing are unavailable to testify before the Senate. As in past impeachment cases, the House should be required to call the witnesses upon whose testimony it intends to rely, examine them under oath before the Senate, and allow them to be subjected to full and fair cross-examination.⁶ Only then will Judge Porteous finally have the opportunity, guaranteed by the Constitution, to confront the witnesses against him in his first and only trial.

Second, Judge Porteous did not have a full or fair opportunity to examine the witnesses who testified at the Fifth Circuit Hearing. As noted above, he was forced to appear and defend

⁶ Consistent with his July 21, 2010 Motion to Exclude Prior Testimony, Judge Porteous does not oppose the use of prior testimony to impeach the credibility of live testifying witnesses. Accordingly, excluding prior testimony will not prejudice the House, as it will remain able to call the witnesses that it previously examined, question them before the Senate, and impeach them if their answers deviate from their prior testimony.

himself at that hearing without the assistance of counsel because the Fifth Circuit's Special Committee refused to allow him any time to obtain new counsel after his former counsel withdrew. This refusal was both grossly unfair and in direct contradiction of the rules governing the Fifth Circuit Hearing, which provided that Judge Porteous had the right to be "represented by counsel at all stages" of the proceedings. (Former Fifth Circuit Rule 11 (now Rule 14).)⁷ The Fifth Circuit's denial of Judge Porteous's right to the assistance of counsel irreparably impaired his ability to conduct full and fair cross-examination. Judge Porteous's brief "opportunity" to cross-examine witnesses before the Fifth Circuit – hastily, alone, and without the assistance of counsel – was window dressing, an "empty formality" that did not satisfy the requirement of "full, substantial and meaningful [cross-examination] in view of the realities of the situation." *United States v. Franklin*, 235 F. Supp. 338, 341 (D.D.C. 1964). Moreover, although Judge Porteous was able to call and/or examine certain witnesses,⁸ he was prevented from calling and examining the Justice Department lawyers (Messrs. Ainsworth and Petalas) who oversaw the government's investigation of him.

The testimony elicited during the Fifth Circuit Hearing was incomplete and constitutionally defective, and should be excluded from this proceeding.⁹

⁷ See Rules Governing Complaints of Judicial Misconduct or Disability, a current copy of which is available on the Fifth Circuit's website at:

<http://www.ca5.uscourts.gov/clerk/localJudicialMisconductRules.pdf>.

⁸ The House argues that Judge Porteous was not prejudiced by his lack of counsel at the Fifth Circuit Hearing because he "attended that hearing, heard the witnesses, ... cross-examined the witnesses, and called his own witnesses." (House Motion at 2.) This argument must fail. The Supreme Court has specifically held that the denial of an accused's right to full and fair cross-examination is "constitutional error of the first magnitude and no amount of showing of want of prejudice" can cure it. *Davis*, 415 U.S. at 318 (quoting *Brookhart v. Janis*, 384 U.S. 1, 3 (1966)).

⁹ To do otherwise would perpetuate the prejudice visited upon Judge Porteous in the Fifth Circuit, as well as violate the requirement that impeachment trials "be conducted in keeping with the basic principles of due process that have been enunciated by the courts and ironically, by the

II. Testimony from the House Task Force Hearings Should Be Excluded

The testimony from the House Task Force Hearings should be excluded for the following four reasons. First, as with the prior Fifth Circuit testimony, the House has failed to assert – much less demonstrate – that any of the witnesses who testified at the House Task Force Hearings are unavailable to testify before the Senate. The absence of this critical fact erects a constitutional bar to the admission of prior testimony. *Crawford*, 541 U.S. at 51-52, 59.

Second, the House Managers made clear that the Task Force Hearings did “not constitute a trial in any sense” and were not subject to “the procedural rules that would govern a federal trial.” (See Letter from A. Schiff and B. Goodlatte to R. Westling dated November 6, 2009, at 1-2.) Representative Schiff further explained that the House Task Force Hearings were “more in the nature of a grand jury proceeding,” where “no objections or other interruptions in the testimony will be permitted.” (House Task Force Hearing Transcript, Ser. No. 111-43, at 5 (Nov. 17, 2009); see also Jonathan Turley, *Congress As Grand Jury: The Role of the House of Representatives in the Impeachment of an American President*, 67 GEO. WASH. L. REV. 735 (1999).) Just as grand jury testimony is regularly excluded from trial proceedings,¹⁰ so too should the testimony elicited during the grand-jury-like House Task Force Hearings be excluded from Judge Porteous’s trial before the Senate.

Congress itself.” *Hastings v. United States*, 802 F. Supp. 490, 492, 504 (D.D.C. 1992), *vacated*, 988 F.2d 1280 (1993) (explaining that “[f]airness and due process must be the watchword whenever a branch of the United States government conducts a trial, whether it be in a criminal case, a civil case or a case of impeachment.”).

¹⁰ See Fed. R. Evid. 801(c), 802, and 804(b)(1); 5 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 8:120 (3d ed. 2010) (noting that the government cannot invoke the former testimony hearsay exception “to offer prior grand jury testimony against defendants, because defendants have no right to attend grand jury proceedings or question witnesses”); *United States v. Darwich*, 337 F.3d 645, 658 (6th Cir. 2003) (excluding grand jury testimony because the defendant had no opportunity to examine the witness).

Third, Judge Porteous was afforded only a token opportunity to examine the witnesses called by the House to testify at the House Task Force Hearings. As discussed in the House Managers' November 2009 letter, Judge Porteous was restricted to only "ten minutes of examination" for those witnesses that the House decided to call to testify against him. (*See* Letter from A. Schiff and B. Goodlatte to R. Westling dated November 6, 2009.) While the House argues that Judge Porteous's counsel was afforded more time to conduct cross-examination when he specifically requested it (House Motion at 5), that minor courtesy does not change the fact that the House Hearings were designed and conducted (like a grand jury) in order to provide support for the House's forthcoming Articles of Impeachment – not to provide Judge Porteous a full and fair opportunity for cross-examination or to determine the ultimate truth of the allegations in the Articles of Impeachment. Given the limitations placed on Judge Porteous's ability to cross-examine witnesses, the House Task Force Hearing testimony was not tested and filtered by a true adversarial process. That testimony should therefore be excluded.

Fourth, Judge Porteous was unrepresented during critical portions of the House Task Force Hearings. Due to a conflict of interest on the part of his prior counsel, Judge Porteous's lead counsel was not present for the testimony of Louis and Lori Marcotte – two individuals central to the allegations contained in Article II.¹¹ As the House acknowledges, "no attorney for Judge Porteous appeared at that hearing." (House Motion at 4.) This deprivation of counsel,

¹¹ Former legal counsel Richard Westling represented the Marcottes in related proceedings in Louisiana and continues to represent them today. When the conflict was raised before the House, Mr. Westling wrote to Louis and Lori Marcotte explaining the possible conflict issues and seeking a waiver of any possible conflict. They declined to consent to such a waiver. Mr. Westling sought to have another lawyer, Remy Voisin Starns, appear in the House proceedings when Louis Marcotte was called as a witness. When Mr. Starns was unable to be present, Mr. Westling elected to avoid any immediate conflict by leaving the proceedings. This left Judge Porteous to continue at the House Task Force Hearing without his then-lead trial attorney.

reminiscent of the Fifth Circuit proceeding, severely impaired Judge Porteous’s ability to conduct even a token ten minute cross-examination of the Marcottes.

The Senate should deny the House’s Motion and exclude all testimony from the House Task Force Hearings.

III. Past Precedent Does Not Support Admission of Prior Testimony from Either the Fifth Circuit Hearing or the House Task Force Hearings

The House’s reliance on prior Senate Impeachment Trial Committee rulings in the *Claiborne*, *Hastings*, and *Nixon* impeachment proceedings is misplaced. None of those decisions countenanced the introduction of prior testimony where the proffered testimony was not subject to full and fair cross-examination. In fact, each of those cases was preceded by at least one full federal *criminal trial*, governed by the Federal Rules of Evidence, the Federal Rules of Criminal Procedure, and the panoply of rights guaranteed by the Constitution – including the Sixth Amendment right to confront and fully and fairly cross-examine adverse witnesses.

In *Claiborne*, the Senate Impeachment Trial Committee granted the House’s request to introduce “select transcripts from Judge Claiborne’s second trial.” (House Motion at 9.) Drawn from his second *criminal trial*, the prior testimony that the Committee allowed the House to introduce had already been tested and refined by all of the procedural and substantive safeguards applicable to federal criminal trials – including full and fair cross-examination. Indeed, as the House itself notes, Committee Chairman Mathias highlighted the significance of the fact that the testimony at issue had been subject to cross-examination in a federal criminal trial. (*Id.*) While the House may wish to argue that any token opportunity for cross-examination will suffice, the decision of the *Claiborne* Committee does not support such an overreaching position.

In *Hastings*, the Senate Impeachment Trial Committee again dealt with a request by the House to introduce certain prior testimony from Judge Hastings’s earlier *criminal trial*. (House

Motion at 11-12.) In ruling on the House's request (granting it in part and denying it in part), the Committee set out general principles governing the introduction of prior testimony. Specifically, the Committee held that it is not "appropriate to admit prior testimony into evidence on key points where credibility, context or interpretation are in dispute – particularly where the opposing party has not had an opportunity for cross-examination." (S. Hrg. 101-194, pt. 2A, at 61-62 (1989), Eighth Order (dated July 10, 1989).)

The House incorrectly claims that the testimony it seeks to introduce "fits squarely within" this precedent. (House Motion at 14.) In fact, each aspect of this governing principle weighs against admitting prior testimony in this case. The prior testimony that the House is attempting to introduce bears on key points of witness credibility, factual context, and value judgments and interpretations that go to the heart of this case. To introduce such evidence would deny Judge Porteous, again, the opportunity to test such specific representations in a fair and open process. Thus, the *Hastings* precedent weighs against granting the House's request.

Finally, in *Nixon*, the Senate Impeachment Trial Committee yet again addressed a request by the House to admit materials from a prior *criminal trial*. (House Motion at 11.) In deciding to admit "all testimony and exhibits in Judge Nixon's criminal proceeding," the Committee specifically based its ruling on the fact that the "prior testimony has been the subject of adverse cross-examination, and its use will not prejudice any party." (S. Hrg. 101-247, at 199 (1989), First Order (dated July 25, 1989).) In this case, however, the prior testimony sought to be admitted by the House has not been the subject of full and fair adverse cross-examination. As a result, its use will significantly prejudice Judge Porteous. Thus, under the *Nixon* precedent, the House's Motion should be denied and the prior testimony excluded.

In the end, the House appears to have taken the position that, while cross-examination of prior testimony is required for admission before the Senate, any token opportunity for cross-examination – regardless of how limited – will do. This cannot be the standard. Indeed, the *Claiborne*, *Hastings*, and *Nixon* Committee decisions uniformly held that prior testimony is admissible in a subsequent impeachment trial where that testimony was elicited in a federal criminal trial, subject to all of the rights, procedures, and safeguards required therein. That simply is not the case here. The testimony that the House is seeking to admit in this proceeding was obtained in proceedings that afforded few or none of the procedural and substantive safeguards and rights inherent in a trial. Accordingly, that prior testimony should be excluded.

IV. The Senate Should Limit Non-Testimonial Exhibits and Other Record Materials from the Fifth Circuit Hearing and House Task Force Hearings

The House’s Motion broadly “requests that the complete evidentiary records of the Fifth Circuit Proceeding and the Task Force Impeachment Hearings be admissible.” (House Motion at 15.) This expansive request extends well beyond prior testimony, which should be excluded for the reasons discussed above, and includes exhibits and other materials accepted into the record in the prior Fifth Circuit and House Hearings. There is no need for such an indiscriminate dump of the “complete evidentiary record[]” from either the Fifth Circuit or the House Task Force Hearings. Granting such a request would unnecessarily burden the Senate with irrelevant and/or duplicative materials. Instead of saddling the Senate with the burden of organizing a sprawling set of materials, the House should specifically identify those documents and other materials that it believes are relevant to the Articles of Impeachment and seek the admission of only those materials. Such a process serves the interests of efficiency, clarity, and fairness.

In addition to objecting generally to the House’s attempted document-dump of Fifth Circuit and House Task Force Hearings materials into the Senate record, Judge Porteous also

objects to the following two categories of material. First, Judge Porteous objects to the inclusion of material in the Senate record that is not specifically relevant to the House's Articles of Impeachment. To the extent that there are issues that either the Fifth Circuit or the House investigated, but which the House decided not to include within its Articles of Impeachment, it would be prejudicial to include such irrelevant material in the Senate record.

Second, Judge Porteous strongly objects to the inclusion of grand jury testimony transcripts in the Senate record. As noted in the House's Motion (at 3-4), Chief Judge Jones admitted into the Fifth Circuit record certain grand jury testimony. Nevertheless, Chief Judge Jones indicated that the Special Committee itself would not rely on that testimony, which – like all grand jury testimony – was elicited without any participation or opportunity for cross-examination by Judge Porteous. (*Id.* at 4; *see also* Fifth Circuit Hearing transcript, at 430.) To the extent that the House is attempting to bootstrap grand jury testimony into the Senate record by requesting that the Senate admit the “complete evidentiary records of the Fifth Circuit Proceedings,” that attempt is improper and should be rejected. The House should make specific requests for admission of prior record evidence in the context of its case in chief, as it would in a federal judicial proceeding, rather than seek to import globally any and all such evidence.

Conclusion

WHEREFORE, Judge Porteous respectfully requests that the Senate deny the House's Motion and not admit into evidence in this proceeding the prior, constitutionally-defective testimony and records from either the Fifth Circuit Hearing or the House Task Force Hearings.

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Respectfully submitted,

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Dated: July 28, 2010

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2010, I served copies of the foregoing by electronic means on the House Managers, through counsel, at the following email addresses:

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